Office-Supreme Court, U.S.
FILED
FEB 9 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1961.

NO. 714

STATE OF ILLINOIS and GLEN D. PALMER,
Petitioners,

vs.

UNITED STATES CIVIL SERVICE COMMISSION,
Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North La Salle Street, Room 900,
Chicago 1, Ill. (FI 6-2000),
Attorney for Petitioners.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
AUBREY KAPLAN,
Assistant Attorneys General,
Of Counsel.

Printed by Authority of the State of Illinois

INDEX

PAGE

The Opinion Below 1

Jurisdiction 2

The statute conferring this court's jurisdiction over this petition 2

The Questions Presented 3

The Federal and State Constitutional Provisions and Statutes Involved 4

Statement of the Case 11

The District Court's Findings, Conclusions and Judgment 13

The Opinion and Judgment of the Court of Appeals for the Seventh Circuit 13

Reasons for Granting the Writ of Certiorari 15

I—The District Court has expressly decided the important questions of Federal Constitutional Law That Have Not Been Decided by this court 15

II—The Civil Service Commission's application of the Hatch Act to this Case denies Illinois "A Republican Form of Government" in violation of Article IV, Section 4, of the Federal Constitution 18

A.

The Application of the Hatch Act to this case unconstitutionally influences Illinois' form of government 18

III—The Commission's Application of the Hatch Act To this Case Denies to Petitioner Palmer and to Illinois' Citizenry Equal Protection and Therefore Denies Them Due Process of Law ... 21

IV—If the Hatch Act is Constitutional in its Focus Upon this Case, the District Court Properly Held that Petitioner Palmer's Activities did not transgress its Provisions. The Court of Appeals erred in holding contrary 22

Conclusion 26

Appendix I—Opinion of United States Court of Appeals for the Seventh Circuit, January 8, 1962 27

Appendix II—Opinion of the United States District Court 36

Appendix III—Judgment of United States Court of Appeals for Seventh Circuit 113

Appendix IV—Title 5, U. S. C., Sec. 118k (Sec. 12) Hatch Political Activities Act 114

TABLE OF CASES AND STATUTES CITED.

USC, Title 5, Sec. 118k (Sec. 12 Hatch Political Activities Act) 4, 22

Constitution of United States, Art. IV, Sec. 4 4

U. S. Judicial Code, Tit. 28, Sec. 2101 2

Ill. Rev. Stat. 1961, Ch. 127, p. 2131 8

Ill. Rev. Stat. 1961, Ch. 127, p. 2167 10

Oklahoma v. U. S. Civ. Serv. Com., 330 U. S. 127 ..... 15, 20, 22

Palmer v. U. S. Civ. Serv. Com., 191 F. Supp. 495 1

United Public Workers' v. Mitchell, 330 U. S. 75 ..... 16, 20, 22

Constitution of 1870, Art. V, Sec. 6 7

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1961.

NO. .....

STATE OF ILLINOIS and GLEN D. PALMER,
Petitioners,

vs.

UNITED STATES CIVIL SERVICE COMMISSION,
Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit. It is reprinted in full as Appendix I to this Petition.

The opinion for the United States District Court is reported *sub. nom., Palmer* v. *United States Civil Service Commission*, 191 F. Supp. 495. It is reprinted in full as Appendix II to this Petition.

The judgment of the Court of Appeals is reprinted in full as Appendix III to this Petition.

The judgment of the District Court is embodied in its memorandum and opinion. The language in this memorandum and opinion constituting the court's judgment is contained in the last two paragraphs thereof. It is in full as follows:

> "The facts and law as herein set out are adopted as findings of fact and conclusions of law by the Court, and for the reasons herein set out the Court finds and determines that the order of the United States Civil Service Commission is not in accordance with law.
>
> "Accordingly this case is remanded to the Commission with directions to set aside the Order, and to dismiss the Letter of Charges."

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 8, 1962.

No petition for rehearing was filed.

THE STATUTE CONFERRING THIS COURT'S JURISDICTION OVER THIS PETITION.

This Court's jurisdiction over this petition for *certiorari* is conferred by Title 28, Section 2101 of the United States Judicial Code, which authorizes this Court to grant *certiorari* to review judgments of United States Courts of Appeal on petitions filed within ninety days from the date of any such judgment.

THE QUESTIONS PRESENTED.

The questions presented are:

1. THE DISTRICT COURT HELD THAT SECTION 12 OF THE HATCH ACT (USC, TITLE 5, SEC. 118 K) AS APPLIED BY THE UNITED STATES CIVIL SERVICE COMMISSION TO THE FACTS OF THIS CASE DENIED TO ILLINOIS AND TO PETITIONER PALMER, WHO DISBURSED FEDERALLY GRANTED FUNDS AS ILLINOIS' DIRECTOR OF CONSERVATION DURING A PERIOD OF TIME WHEN HE WAS A COUNTY CHAIRMAN AND PRECINCT COMMITTEEMAN OF THE REPUBLICAN PARTY OF ILLINOIS, DENIED ILLINOIS A REPUBLICAN FORM OF GOVERNMENT, HENCE VIOLATED ARTICLE IV, SECTION 4, OF THE CONSTITUTION OF THE UNITED STATES AND WAS THEREFORE UNCONSTITUTIONAL.

DID THE COURT OF APPEALS ERR IN HOLDING TO THE CONTRARY?

2. DOES THE APPLICATION OF SECTION 12 OF THE HATCH ACT TO ILLINOIS AND PETITIONER PALMER, WHO HELD HIS OFFICE BY APPOINTMENT OF THE GOVERNOR, DENY ILLINOIS AND HER CITIZENRY EQUAL PROTECTION AND THEREFORE DENY THEM DUE PROCESS SINCE THAT ACT CONCEDEDLY WOULD NOT APPLY TO A STATE IN WHICH FEDERAL GRANTS SIMILAR TO THOSE INVOLVED IN THIS CASE ARE DISBURSED BY ELECTED OFFICIALS WHO HOLD OFFICES IN POLITICAL PARTIES IN SUCH STATES?

3. THE COURT OF APPEALS HELD THAT OKLAHOMA VS. U. S. CIVIL SERVICE COM., 330 U. S. 127, "DID SPECIFICALLY AND DEFINITELY DECIDE THE HATCH ACT WAS CONSTITUTIONAL." BUT OKLAHOMA DID NOT INVOLE AND THIS COURT DID NOT MENTION THE CONSTITUTIONAL GUARANTY "OF A REPUBLICAN FORM OF GOVERNMENT."

DID THE COURT OF APPEALS ERR IN READING THE OKLAHOMA CASE AS DISPOSITIVE OF THIS CASE?

4. THE COURT OF APPEALS HELD THAT THE FEDERAL JUDICIARY CAN NOT INVALIDATE A FEDERAL STATUTE BECAUSE IT DENIES TO A STATE A REPUBLICAN FORM OF GOVERNMENT, DECLARING THAT THE GUARANTY OF THIS FORM OF GOVERNMENT IS A MATTER FOR CONGRESS.

DID THE COURT OF APPEALS ERR IN HOLDING THAT BECAUSE FEDERAL COURTS CANNOT COMPEL A REPUBLICAN FORM OF GOVERNMENT IN THE ABSENCE OF STATUTE, THEY MAY NOT STRIKE DOWN SUCH A STATUTE EVEN THOUGH ITS EFFECT IS TO DENY SUCH A FORM OF GOVERNMENT?

5. THE DISTRICT COURT HELD THAT PETITIONER PALMER'S ACTIVITIES IN DISBURSING FEDERALLY GRANTED FUNDS WAS NOT HIS "PRINCIPAL EMPLOYMENT" UPON THE ADMITTED FACTS OF THIS CASE. DID THE COURT OF APPEALS ERR IN REVERSING THIS DECISION?

THE FEDERAL AND STATE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Federal Constitutional Provisons Involved.

Article IV, Section 4 of the Constitution of the United States is as follows:

> "Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Pertinent provisions of the Fifth Amendment to the Constitution of the United States are as follows:

> "No person shall — be deprived of • • • liberty or property, without due process of law."

The Federal Statute Involved.

The Federal statute involved is Section 12 of the Hatch Political Activities Act (U.S.C., Title 5, Sec. 118k).

Its pertinent provisions are set forth in full as Appendix IV to this petition.

1. The statutory scheme

Section 12(a) of the Hatch Act, *infra*, p. 3, directs that "no officer or employee[1] of any state or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency" shall, *inter alia*, "take any active part in political management or in political campaigns."

Section 12(b), *infra*, p. 4, provides for investigations by the Civil Service Commission upon complaint, notice to both the allegedly offending person and the state with whom he is employed, and a hearing. The Commission is then to "determine whether any violation of [subsection (a)] has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it was committed from his office or employment," with an eighteen-month ineligibility for reappointment. The Commission is to notify both the individual and the state of its determination. If the individual is not removed within thirty days of such notification, or has been reappointed to any position in a state or local agency in that state within eighteen months of removal, the Commission is to "certify to the appropriate Federal agency an order requiring it to withhold from its loans or grants to the state or local agency * * * an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation." Notice of this order is to be sent to the state or local agency from which such amount is ordered to be withheld.

---

[1] The concluding sentence of section 12(a) states that "the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices." We show *infra*, pp. 39-41, that plaintiff Palmer's position is not included within these exemptions.

Section 12(c) provides that "any party aggrieved by any determination or order" may procure district court review "of such determination or order" by the filing of a petition for such review. This review is based on the administrative record. The Commission's findings of fact are conclusive if supported by substantial evidence and its determination or order is to be affirmed if it "is in accordance with law."

Section 12 of the Hatch Political Activities Act, as added by Section 4 of the Act of July 19, 1940, 54 Stat. 767, 5 U.S.C. 118k, provides in pertinent part:

> (a) *Influencing elections; officer or employee defined.* No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices.

The Provisions of the Constitution of Illinois That Are Involved.

The provisions of the Constitution of Illinois that are involved are:

Article V, Sec. 6—Constitution of 1870.

"SEC. 6. The Supreme Executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.

SEC. 10. The governor shall nominate, and by and with the advice and consent of the Senate, (a majority of all the senators elected concurring by yeas and nays) appoint all officers whose offices are established by this constitution, or which may be created by law and whose appointment or election is not otherwise provided for; and no such officer shall be appointed or elected by the general assembly.

SEC. 12. The governor shall have power to remove any officer whom he may appoint in case of incompetency, neglect of duty, or malfeasance in office; and he may declare his office vacant, and fill the same as herein provided in other cases of vacancy.

SEC. 23. The officers named in this Article shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms * * *

SEC. 24. Definition and Oath of Office. An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected, or appointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished.

SEC. 25. All civil officers, except members of the general assembly and such inferior officers as may be by law exempted, shall, before they enter on the duties

of their respective offices, take and subscribe the following oath or affirmation: 'I do solemnly swear (or affirm as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of ———— according to the best of my ability.'

And no other oath, declaration or test shall be required as a qualification.

Article IV, Section 1 of the Constitution of Illinois provides:

> The legislative power shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people."

The Statutes of Illinois That Are Involved.

"In pursuance of this constitutional power, the General Assembly, in the year 1917, and as subsequently amended, passed the 'Civil Administrative Code,' providing for the creation of departments of State government. This code is found at Chapt. 127, State Government, I.R.S., 1961 p. 2131. This Code, by Section 2, provides:

> SEC. 2. The word 'department' as used in this Act shall, * * * mean the several departments of the State Government as designated in Section 3 of this Act and none other.

Section 3 provides for fifteen departments of State government. Among these is the Department of Conservation; Sec. 4 of the Act provides:

> Each department shall have an officer at its head who shall be known as a director and who shall * * * execute the powers and discharge the duties vested by law in his respective department. The following officers are hereby created: * * * Among others are: Director of Conservation, for the Department of Conservation * * * Director of Personnel for the Department of Personnel.

It is thus apparent that under the constitutional provisions and the laws enacted pursuant thereto that respondent Palmer is a State officer, and not a State employee. His appointment came from the 'Supreme Executive power', the Governor. The office was created by the General Assembly, in which the Illinois Constitution vests the legislative power to enact laws and create the office by the enactment of laws.

The qualifications of the Director of Conservation are not prescribed by the Code. Section 11 of the Code provides:

> Each officer provided for by this Act shall perform such duties as may be prescribed by law for his position and to the best of his ability shall render faithful and efficient service in the performance of his duties, to the end that the public interest and welfare may be furthered.

Section 12 of the Code provides that the appointment of all officers created by the Code shall be made by the Governor, by and with the advice and consent of the State Senate. Sec. 13 provides a term of office of two years. Sec. 14 provides for the constitutional oath of office. Sec. 15 provides for a bond and Sec. 20 authorizes the employment of necessary employees. Nothing in the Act provides that respondent Palmer shall not be a precinct committeeman, nor is there any provision in the Act that prevents him from being a political party county chairman. There is only one office created by the Code which requires freedom from political activity, and that is the office of Director of Personnel. Sec. 63b 105 of the Administrative Code provides the qualifications of the Director of the Department of Personnel. This Section provides:

> 63b 105. The Department of Personnel shall have an officer at its head who shall be known as the Director of Personnel. He shall be appointed by the Governor, by and with the advice and consent of the Senate, as provided in Civil Administrative Code of Illinois, and shall be subject to the provisions of that

Code, except as herein otherwise provided. The Director of the Department of Personnel shall be a person who shall have had practical working experience in the field of personnel administration. The Director shall be selected for appointment from among those persons who, for the two years next preceding the appointment, have not been members of any local, state or national committee of any political party, or officers or members of standing committees of any partisan political group or organization. Nor shall the appointee, during his tenure as Director of Personnel, become a member of any local, state or national committee of a political party, or an officer or member of standing committee of any partisan political group or organization.

The Illinois Personnel Code, under Sec. 63B104c(7), (Sec. 4c) of the Code, I.R.S., Vol. II 1961, page 2167, Chapt. 127, specifically exempts 'Directors of Departments' * * * and all other positions appointed by the Governor by and with the consent of the Senate from the provisions of the Personnel Code.

The public policy of Illinois, as declared by its law in respect to political activity, is different from the policy as declared in Section 12 (118k) known as the Hatch Act. The Hatch Act Section in question states among other things,

> No such officer * * * shall take any active part in political management or in political campaigns * * * For the purpose of the second sentence of this subsection, the term 'officer or employee' shall not be construed to include (1) the Governor or Lieutenant Governor of any State, or any person who is authorized by law to act as Governor, or the Mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil service system; (3) officers holding elective offices."

STATEMENT OF THE CASE.

Under Illinois' Constitution (Art. V Sec. 16) and the applicable provisions of Illinois' Code for the Government of the States (Ill. Rev. Stats. 1961, Ch. 127 pp. 2166, set forth at p. 2167, the office of Director of the Department of Conservation of the State of Illinois is filled by appointment at the hands of the Governor.

Petitioner Glen D. Palmer held that office by gubernatorial appointment during all of the period of time involved in this case.

"It is undisputed that $2,263,661.20 of federal funds under three different federal-aid programs were paid to the State of Illinois during Palmer's tenure as Director of the Department of Conservation from 1953 to 1958." (*Opinion of the Court of Appeals, post.*)

These "$2,263,611.20 of federal funds" were granted to Illinois and disbursed by that State's Department of Conservation under the Federal Aid to Wild Life Act"; U.S.C., Tit. 16, 669-669-i, the Dingall-Johnson Act, Title 16 U.S.C. 777-777 k, and the Clark-McNary Act, 16 U.S.C. 471, 505, 515, 564-570. The funds were used for the preservation or propagation of wild life.

Petitioner Palmer held the admittedly political offices of "Chairman of the Kendall County (Illinois) Republican Committee" and "Precinct Committeeman of the Republican Party in Illinois" during all of the time of his incumbency in the office of Director of Conservation. The Court of Appeals thus extracts the essence from the 43 pages of the District Court's pronouncements in this case:

"Mr. Palmer estimated that fifty percent of his time was spent on the Division of Parks-Memorials, but he could

make no specific allocation of the balance of his time among the other Divisions. He did say he spent less than one percent of his time on federal aid projects, and explained this was possible by reason of the activities of two full-time coordinators who supervised the administration of twenty to twenty-five federal aid projects then in the Illinois Department of Conservation. These coordinators are state employees appointed by the Director of the Illinois Department of Conservation subject, by state consent, to qualification approval by federal agencies.

"The hearing examiner found the funds paid by the Federal Government under the conservation programs hereinbefore described, were "grants" under sec. 12 of the Hatch Act. He also found that Mr. Palmer, in his office as Director of the Department of Conservation, was a state officer covered by sec. 12 of the Act. However, he recommended that the matter be viewed as *de minimis*.

"The Commission agreed with the examiner that Palmer had, in fact, been engaged in activities which were political; that the State had received substantial grants from the Federal Government, and that Palmer's office as Director was not one of the offices exempted by sec. 12(a) of the Act. The Commission rejected the examiner's suggestion that the matter was *de minimis*.

"Upon application by plaintiffs, the Commission reconsidered the question of *de minimis*, but again rejected same. In its order of October 1, 1959, the Commission pointed to Mr. Palmer's position of responsibility for all of the activities of the Department of Conservation, including those financed in whole or in part by federal funds, and noted that these responsibilities were not lessened by the delegation of duties respecting particular projects to particular subordinates. The Commission pointed out that during Mr. Palmer's tenure in office, approximately eight percent of the total expenditures of his Department came from federal grants."

The District Court's Findings, Conclusions and Judgment.

The District Court held that to apply Section 12 of the Hatch Act to Illinois and petitioner Palmer in consequence of his official duties and political activities that are summarized above would deny to Illinois a Republican Form of Government in violation of Article IV, Section 4, of the Constitution of the United States.

Moreover the District Court, documenting its findings and conclusions at a length that we do not reproduce in this Statement of the case, held that since petitioner Palmer "spent less than one per cent of his time on federal-aid projects" and explained that

> "This was possible by reason of the activities of two full time coordinators who supervised the administration of twenty to twenty-five federal aid projects then in the Illinois Department of Conservation"

These employees were subject, by State consent, to qualification approval by federal agencies."

Palmer's "principal employment", the District Court held, was not "in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency within the meaning of Section 12 of the Hatch Act."

The District Court therefore reversed and set aside the findings and rulings of the United States Civil Service Commission to the contrary.

The Opinion and Judgment of the Court of Appeals for the Seventh Circuit.

The Court of Appeals disagreed with all of the pronouncements of the District Court.

The Court of Appeals held that this court's decision in *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, held Section 12 of the Hatch Act "constitutional".

But the *Oklahoma* case did not ever raise, nor did this Court consider in that case either the contention that the Act denies a Republican form of government or that it unconstitutionally discriminates against states whose cabinet officials, who disburse state funds are appointed, as was true of Petitioner Palmer.

Moreover, the Court of Appeals expressly decided an important Federal constitutional question that was implicitly decided by the District Court when the Court of Appeals rejected petitioners' contention that to withhold federally granted funds from Illinois so long as Illinois' Director of Conservation was appointed by the Governor when similar grants are not withheld from a State whose federally granted funds are disbursed by an elected officer, denies petitioners' Palmer, Illinois and Illinois' citizenry equal protection and that since the Due Process Clause of the Fifth Amendment impliedly embraces equal protection of the law within the meaning of the Fourteenth Amendment, the application of Section 12 of the Hatch Act denies due process to petitioners Palmer, Illinois and Illinois' inhabitants.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

I.

THE DISTRICT COURT HAS EXPRESSLY DECIDED TWO IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW THAT HAVE NOT BEEN DECIDED BY THIS COURT.

Mindful that this Court does not ordinarily grant *certiorari* unless the court below has decided questions of more than usual moment to the national jurisprudence, under this Point of this Petition we emphasize only the importance of the questions presented. We defer argument on the merits to Point II of this Petition, *post*, **Section 12 of the Hatch Act as applied to this case denies to Illinois a Republican Form of Government,** and Point III, *post*, **Section 12 of the Hatch Act as applied to this case denies petitioners Palmer, Illinois and Illinois' citizenry equal protection and therefore denies them due process of law.**

The opinion of the Court of Appeals declares

> "The District Court's lengthy discussion of *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127, strongly indicates the belief that the case was wrongly decided. Several critical references are made to that Supreme Court opinion. At 191 F. Supp. 495, at 520, appears the following quotation from the Supreme Court decision in the *Oklahoma* case: '. . . . It (United States) does have power to fix the terms upon which its money allotments to States shall be disbursed.' The District Court comments: 'There is no citation of Constitutional authority to this proposition.'
>
> "Whether or not the Supreme Court sufficiently documented its holdings in the *Oklahoma* case by cita-

> tions, footnotes or otherwise, there can be no doubt that the Court did specifically and definitely decide the Hatch Act was constitutional."

But neither *Oklahoma* v. *United States Civil Service Commission* nor the companion case decided the same day, *United Public Workers* v. *Mitchell, id.* 75, even mentioned the guaranty "to every State in this Union of a Republican Form of Government."

Oklahoma did not invoke that provision of the Constitution.

The Federal employees in the *United Public Workers'* case could not invoke it because all of their rights and claims of rights arose under the laws governing the District of Columbia. No State was concerned and hence the form of no State government could have been involved in the *United Public Workers'* case.

All that the *Oklahoma* case held was that Section 12 of the Hatch Act did not violate the Tenth Amendment to the Constitution of the United States which provides,

> "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people",

and that the Hatch Act did not unconstitutionally abridge any of the rights of State employees embraced by its provisions under the First Amendment to the Constitution of the United States. In other words all that this Court held was that entrusting the disbursement of federal funds only the persons who did not engage in political activities within the meaning of the Act did not deprive any State employee of his right of freedom of speech or assembly.

But when Section 12 of the Hatch Act as applied in State (*not* to Federal) employees, its most serious impact is not upon the tenor of life or liberty of a State employee.

The dominant thrust of the Act is *at the form of State governments;* for if the Hatch Act is valid in its focus upon cases such as this one, a State must choose, by legislation or even by amendment of its Constitution, if necessary, whether it will **(1)** disburse its federally granted funds by elected officials, **(2)** disburse those funds by officials who eschew all "political activity" and therefore forbear the historic prerogatives of statesmen or **(3)** forego Federally granted funds by permitting appointed officials to engage in political activity.

This question was not presented in the *Oklahoma* case.

The Court of Appeals has decided this question adversely to Illinois and to petitioner below; but although it has **thus decided** the question, it has explicitly forborne *considering* that question; for it has declared, quite mistakenly but none the less plainly, that this Court foreclosed that question in the *Oklahoma* case.

Thus a decision of the District Court of Illinois for the Northern District of Illinois declaring Section 12 of the Hatch Act unconstitutional in its application to this case has been set aside without consideration of the merits of the District Court's holding upon the erroneous premise that the question has already been decided by this Court when in fact this Court has never even menioned it.

Precisely similar considerations apply to the holding by the declaration upon the part of the Court of Appeals foreclosing consideration of the very substantial contention that to grant federal funds to a State in which those funds are disbursed by the elected officer and to withhold them from a State in which they are disbursed by an appointed officer unless the appointed officer abstains from political activities enacts an invidious discrimination against and therefore denies equal protection to the citizens of the States such as Illinois.

The merits of these questions are briefly argued under Points II and III of this brief, *post*.

II.

THE CIVIL SERVICE COMMISSION'S APPLICATION OF THE HATCH ACT TO THIS CASE DENIES ILLINOIS "A REPUBLICAN FORM OF GOVERNMENT" IN VIOLATION OF ARTICLE IV, SECTION 4, OF THE FEDERAL CONSTITUTION.

A.

The Application of the Hatch Act to this case unconstitutionally influences Illinois' form of government.

The Commission's reading of the Hatch Act as applicable to the facts of this case, which reading has been sanctioned by the Court of Appeals, means that so long as Illinois receives Federally granted funds for the purposes of conservation of wild life and kindred objects, Illinois must either disburse those funds through the office of a State cabinet member who is elected, in which case he may engage in partisan or other political activity without any Federally imposed restraints or limitations whatever, or administer those funds through an appointed executive who is forbidden to engage in any kind of politics (the criterion is extremely but perhaps not unconstitutionally vague) except voting and expressing his political views in conversations that are sufficiently private not to constitute Federally inhibited "political activity."

Since the amounts of Federal grounds are steadily mounting, as are the Federal taxes from which those funds must be disbursed, it would be diffifult to coffceive of an exertion of the Federal power, which on the one hand gathers and on

the other hand gives away revenues, that would more clearly dictate the architecture of a State government.

Should Illinois either amend her Constitution so that her Director of Conservation would be elected or amend her statutes so that Federal grants such as those involved in this case would be disbursed directly by the elected Governor of Illinois, her elected Lieutenant Governor, Secretary of State, even her Attorney General (who, in Illinois, happens to be an elected official) or through any other *elected* official, there could be no possible violation of the Hatch Act.

Thus the thrust and impact of the Hatch Act upon Illinois is to deny to her citizenry a cabinet of appointed statesmen unless none of these appointed cabinet officers disburse Federally granted funds or unless all of them abstain from espousing political causes as officers of organized political parties.

But the opinion of the Court of Appeals overlooks the following signal, indeed, cardinal principles of constitutional law:

It is one thing to say, as this Court has said, that the Federal judiciary, including even this Court, can not fashion or instaurate a Republican Form of Government *in the absence* of congressional action.

For example, no Federal court, not even this one, could appoint a receiver, trustee or other custodian of a State's resources with power to install "a Republican Form of Government" as the means of protecting the State's sovereignty. At least, no Federal court could do this without positive congressional action, which would hardly be taken unless the State's Republican Form of Government had almost completely collapsed.

It is quite another thing to say that a Federal court *must affirmatively enforce* an act of Congress that does *not*

"guarantee" but on the contrary very effectively *denies* "a Republican Form of Government."

The Court of Appeals reads this Court's decision in *Oklahoma* v. *U.S. Civil Service Com.*, 330 U.S. 75, decided as a companion case to *United Workers* v. *Mitchell, id.* 127, which the Court of Appeals does not cite, as declaring that the Hatch Act is proof against all constitutional objections, including the objections raised by petitioners in this case.

But, as we have shown under Point I, *ante*, this Court has thus far held only that the Hatch Act does not abridge the right of any citizen under the First Amendment to the Constitution and does not enact an incursion upon the rights reserved to the States under the Tenth Amendment.

The very serious question whether the Hatch Act as applied to this case denies to a State such as Illinois "a Republican Form of Government" was not even raised or mentioned in, much less was that question decided by the *Oklahoma* or *United Workers'* cases.

The question is one of sufficient moment to elicit *certiorari.*

We submit that the answer to that question should command reversal of the Judgment of the Court of Appeals in this case.

III.

THE COMMISSION'S APPLICATION OF THE HATCH ACT TO THIS CASE DENIES TO PETITIONER PALMER AND TO ILLINOIS' CITIZENRY EQUAL PROTECTION AND THEREFORE DENIES THEM DUE PROCESS OF LAW.

The considerations already developed demonstrate that although Federal funds are garnered by Federal taxing measures and processes that do not deny equal protection, those funds are dispensed only to States who disburse the funds either by elected officials, in which case the disbursing officials may engage in unrestricted political activity, or by officials who are appointed and who abstain from political activity.

Thus the right of a citizen or other inhabitant of a State to receive Federally granted funds depends, not upon his own or the State's need of such funds, but on how the disbursing official is chosen and if he is appointed, upon the nature of the "political activities" in which he engages.

The needs of an unemployed person, a dependent child, or even a huntsman who desires to shoot game under a State's conservation program do not in the least depend upon how the disbursing official is chosen or upon the nature of the political activities in which that official engages.

Yet the statute discriminates in favor of or against a State's inhabitants, not upon the basis either of their contribution to or need of Federal revenues, but upon how their public officials are chosen and upon what kind of private political activities those officials engage in if perchance they are appointed and not elected.

For example, it may commend itself to Congress to grant Federal funds for the suppression of the kind of crimes that endanger the national welfare and to command that those funds be disbursed under a State's Attorney General.

It so happens that in Illinois, the Attorney General who now represents these petitioners in this case is elected. Until Illinois' Constitution is changed to provide for an appointed Attorney General, the Attorney General of Illinois can engage in any kind of political activity and still disburse Federal funds because he is elected.

But in many other States, the Attorney General is appointed.

An Attorney General in such a State can not disburse one cent of Federally granted funds unless he abstains from all political activities except those of voting and privately expressing his views on questions of the day.

This question was not even broached, much less was it considered and still less was it decided in the *Oklahoma* and *United Public Workers'* cases.

IV.

IF THE HATCH ACT IS CONSTITUTIONAL IN ITS FOCUS UPON THIS CASE, THE DISTRICT COURT PROPERLY HELD THAT PETITIONER PALMER'S ACTIVITIES DID NOT TRANSGRESS ITS PROVISIONS. THE COURT OF APPEALS ERRED IN HOLDING CONTRARY.

Section 12 of the Hatch Act (15 U.S.C. 118-k) (a) provides, in pertinent part:

> "No officer or employee of any State or local agency whose *principal employment* is in connection with any

activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency or person for political purposes. No *such officer or employee shall take any active part in political management or in political campaigns.*" (Emphasis supplied.)

But the district court found on uncontradicted evidence in the record (R. 187-188):

"Forestry is divorced from all other activities of the Department, and it is under the supervision of the State Forester who even must be approved by the Federal Agency before the State of Illinois can employ him for the position. It further appears from this record that during the six year period in question, that the General Assembly of Illinois appropriated and spent the total sum of $35,975,405.21; that the Federal Agencies have approved projects for which Illinois has been reimbursed in the sum of $2,263,661.20, or a total percentage reimbursement of 6.30. This record further shows the numerous and burdensome duties of the Director under State law; that practically all that the Director had to do with projects connected with Federal cooperative plans was to sign his name to documents to be sent to Federal Agencies, sign requests for reimbursement, and then transmit them to the State Auditor of Illinois for deposit in the Illinois State Treasury. The record here shows that the Director spent less than one per cent of his time in connection with projects involving federal aid to fish, game and wildlife, and no time in connection with forestry. It is a simple prob-

> lem of arithmetic to thus conclude that less than 1/100 of his time, when divided into 6.3% of the refunded portion, and that his time thus spent would amount to less than .063% in relation to total activities financed in part with federal funds."

If this clear finding by the district court, based upon factual materials in the record that the United States does not challenge, precipitates the question as to the proper construction of Section 12 of the Hatch Act in its application to the facts of the instant case, that question should be resolved (1) in a way that recognizes the autonomy of the States, (2) in a way that does not permit a recalcitrant State officer to frustrate the policy of Congress and the rights of the citizenry of his State by refusing to retire from the office from which he cannot be removed and (3) avoids the constitutional questions argued under Points II and III of this Argument.

But the District Court's findings were clearly correct insofar as they declared that petitioner Palmer's "principal employment" was not "in connection with any activity which is financed in whole or in part" by Federal loans or grants.

Petitioner Palmer's *principal employment* was *not* that of forestry or protecting fish, game or wild life in any of the respects that were specifically aided by the Federal grants involved in this case.

The Commission and the Court of Appeals have read Section 12 of the Hatch Act as meaning that since petitioner Palmer's activities were those of directing Illinois' "Department of Conservation", since that Department does conserve forests, fish, game and wild life in many different and divers ways, and since Federal funds do in part finance *some* of Illinois' policies of conservation, peti-

tioner Palmer could not hold his office as a member of Illinois' cabinet while he was an active official of the Republican Party.

The fallacy implicit in the Court's view of this case is best exposed by the above clear statement of it.

Conclusion.

For reasons apparent upon the record and urged in this petition, it is respectfully submitted that this case should evoke *certiorari* to review and reversal of the judgment of the Court of Appeals in this case.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 N. La Salle St., Suite 900,
Chicago 1, Illinois, (FI 6-2000),
Attorney for Petitioners.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
AUBREY KAPLAN,
Assistant Attorneys General,
Of Counsel.

APPENDIX I.

IN THE

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

No. 13382 SEPTEMBER TERM AND SESSION, 1961

GLEN D. PALMER and the STATE OF ILLINOIS, *Plaintiffs-Appellees*, v. UNITED STATES CIVIL SERVICE COMMISSION, *Defendant-Appellant.*	Appeal from the United States District Court for the Southern District of Illinois.

January 8, 1962

Before DUFFY, SCHNACKENBERG and KILEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* This action was brought to set aside the determination of the United States Civil Service Commission (Commission) that certain political activities of the plaintiff, Glen D. Palmer, while he was Director of the Department of Conservation of the State of Illinois, violated sec. 12 of the Hatch Political Activities Act (Hatch Act).[1] The District Court directed the Commission to set aside its determination and dismiss the letter of charges which had initiated the administrative proceeding.

On June 9, 1958, the Commission issued a letter of charges against the plaintiffs. The charge made was that plaintiff Palmer, from the time of his employment by the

[1] Title 5 U.S.C. § 118k.

State of Illinois, Department of Conservation, on June 28, 1953, had taken an active part in political management and political campaigns. It is not denied in this record that Palmer served actively as Precinct Committeeman and as Chairman of the Kendall County Republican Committee throughout the period of his employment.

The District Court filed a forty-three page opinion (*Palmer v. United States Civil Service Commission*, 191 F. Supp. 495). The opinion contained a detailed discussion of the applicability of the decision of the Supreme Court of the United States in *Oklahoma v. Civil Service Commission*, 330 U.S. 127. The District Court concluded the Hatch Act remedies violated plaintiff Palmer's "legal vested rights." The Court also held the maxim *de minimis non curat lex* was applicable to the facts in this case.

Pertinent quotations from the Hatch Act are: "No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency . . . No such officer or employee shall take any active part in political management or in political campaigns . . . [T]he term 'officer or employee' shall not be construed to include . . . (3) officers holding elective offices."

It is undisputed that $2,263,661.20 of federal funds under three different federal aid programs were paid to the State of Illinois during Palmer's tenure as Director of the Department of Conservation from 1953 to 1958.

The Pittman-Robertson Act also known as The Federal Aid to Wild Life Act, 16 U.S.C. 669-669i, authorizes the Secretary of Interior to cooperate with the states through their respective State Fish and Game Departments in wild life-restoration projects. The federal contribution to the States under this Act is set apart in the United States Treasury as "The Federal aid to wild life-restoration fund," the monies for which were accumulated from federal taxes imposed on firearms, shells and cartridges.

The Dingell-Johnson Act, 16 U.S.C. 777-777k contains provisions for the restoration and management of all species of fish which have a material value in connection with sport or recreation in marine or fresh waters of the United States. The federal contributions come from revenues obtained from federal taxes on fishing rods, creels, reels, artificial lures, baits and flies. 16 U.S.C. 777b.

The Clarke-McNary Act, 16 U.S.C. 471, 505, 515, 564-570 makes provision for cooperative undertakings between the Secretary of Agriculture and the States or their agencies with respect to systems of forest fire prevention and suppression and the procurement, production and distribution of forest-tree seeds and plants.

The Department of Conservation is the agency designated by the State of Illinois to deal cooperatively with the Federal Government in programs concerning fish, wild life and forestry conservation. Smith-Hurd Illinois Annotated Statutes, Chapter 127, Section 63a, 63b, 63b1.

It was proved and it is without dispute that the separate Fish and Game fund maintained within the General Treasury of the State of Illinois received the federal monies under the Pittman-Robertson and the Dingell-Johnson Acts. Also, that federal monies were paid under the Clark-McNary Act dealing with the Forestry program, and federal payments also were made under the Federal Soil Bank program.

As Director of the Department of Conservation of the State of Illinois, it was Mr. Palmer's statutory duty to supervise the nine Divisions of his Department and some ten or twelve boards, commissions and councils. He alone had complete responsibility for policy direction and administration of the Department.

Mr. Palmer estimated that fifty percent of his time was spent on the Division of Parks-Memorials, but he could make no specific allocation of the balance of his time among the other Divisions. He did say he spent less than one percent of his time on federal aid projects, and explained this was possible by reason of the activities of two

full-time coordinators who supervised the administration of twenty to twenty-five federal aid projects then in the Illinois Department of Conservation. These coordinators are state employees appointed by the Director of the Illinois Department of Conservation subject, by state consent, to qualification approval by federal agencies.

The hearing examiner found the funds paid by the Federal Government under the conservation programs hereinbefore described, were "grants" under sec. 12 of the Hatch Act. He also found that Mr. Palmer, in his office as Director of the Department of Conservation, was a state officer covered by sec. 12 of the Act. However, he recommended that the matter be viewed as *de minimis*.

The Commission agreed with the examiner that Palmer had, in fact, been engaged in activities which were political; that the State had received substantial grants from the Federal Government, and that Palmer's office as Director was not one of the offices exempted by sec. 12(a) of the Act. The Commission rejected the examiner's suggestion that the matter was *de minimis*.

Upon application by plaintiffs, the Commission reconsidered the question of *de minimis*, but again rejected same. In its order of October 1, 1959, the Commission pointed to Mr. Palmer's position of responsibility for all of the activities of the Department of Conservation, including those financed in whole or in part by federal funds, and noted that these responsibilities were not lessened by the delegation of duties respecting particular projects to particular subordinates. The Commission pointed out that during Mr. Palmer's tenure in office, approximately eight percent of the total expenditures of his Department came from federal grants.

The District Court's lengthy discussion of *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127, strongly indicates the belief that the case was wrongly decided. Several critical references are made to that Supreme Court opinion. At 191 F. Supp. 495, at 520, appears the following quotation from the Supreme Court decision

in the *Oklahoma* case: "'. . . [I]t, [United States] does have power to fix the terms upon which its money allotments to States shall be disbursed.'" The District Court comments: "There is no citation of Constitutional authority to this proposition."

Whether or not the Supreme Court sufficiently documented its holdings in the *Oklahoma* case by citations, footnotes or otherwise, there can be no doubt that the Court did specifically and definitely decide the Hatch Act was constitutional.[2]

The Supreme Court said, 330 U.S. at 143: "The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. . . . The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid. . . ."

The District Court states, 191 F. Supp. at 532: ". . . The Supreme Court . . . has said that the Act in question [Hatch Act] is constitutional, and this Court is bound thereby. . . ." Nevertheless, in the next paragraph the District Court states: "However, the Oklahoma case leaves open the question of the constitutional rights of the state officer."

To try to understand the distinction made by the District Judge, we quote further from his opinion: ". . . Thus it can readily be seen that the Hatch Act, when it points to the executive departments under the Governor, strikes at the supreme executive authority of Illinois, and this it cannot do any more than it could strike at the supreme executive authority of the United States, the Presidency. . . ." (190 F. Supp. at 530). Also, "None of the salary

[2] In the companion case of *United Public Workers of America, et al.* v. *Mitchell, et al.*, 330 U.S. 75, the Supreme Court upheld the constitutionality of the Hatch Act as to a federal employee.

of Mr. Palmer, as a State officer, comes from Federal funds." (Page 535) The District Court seems to sum up its position in the following quotation: "It follows that the respondent, Glen D. Palmer, is protected in these rights for all purposes as disclosed in this record under the Constitutions of the United States and of the State of Illinois, and to place him under recall or to withhold him from office under penalty to the State of having the Commission order the withholding of funds mutually and cooperatively provided for under the respective acts, both Federal and State, above mentioned simply because he holds a political party position, or is a member of a political committee, as permitted by Illinois law, is not within the law and would violate his legal vested rights, all of which are guaranteed by both the Federal and State Constitutions as herein above mentioned." (190 F. Supp. at page 535)

We must give more than lip service to the clear and definite holding of the Supreme Court that the Hatch Act is constitutional. In the *Oklahoma* case, the State of Oklahoma had urged as grounds for holding the Hatch Act unconstitutional, 1) that it was an invasion of the sovereignty of the State in violation of the United States Constitution, and further, that the Act was invalid as an unlawful delegation of power; 2) if valid, the Act applies only to "active" participation in political management or political campaigns, and that "active" participation had not been shown; and 3) if valid, the Act did not warrant the United States Civil Service Commission in ordering the removal of the state official or alternatively, the application of a penalty to the State of Oklahoma. Similar contentions are made in the case at bar, yet these and other suggestions of invalidity were expressly rejected by the Supreme Court.

In the *Oklahoma* case, the state official, Paris, while a member of the State Highway Commission, was, for nine months, Chairman of the Oklahoma Democratic State Central Committee. His participation in politics during the nine-month period was comparatively modest because

Oklahoma had not general election that year, and the State Democratic Headquarters were closed at least for a part of that period. Funds had been received by Oklahoma from the Federal Government to be used for highway purposes. The Civil Service Commission determined these facts constituted taking an active part in political management or in political campaigns, and warranted the removal of Paris as Highway Commissioner.

Specifically, the Supreme Court held that ". . . [T]he United States . . . does have power to fix the terms upon which its money allotments to states shall be disbursed." and "The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. . . ." (330 U.S. at 143)

The factual differences between the case at bar and the *Oklahoma* case are of no importance. The Supreme Court squarely answered in favor of validity of the Hatch Act, every major assertion of unconstitutionality raised by the plaintiffs in this case. The claim that Palmer was deprived of vested rights without due process was settled in principle in the companion case of *United Federal Workers of America* v. *Mitchell*, 330 U.S. 75.

We hold that the case at bar is controlling by *Oklahoma* v. *United States Civil Service Commission*, 330 U.S. 127. It validated the removal-or-forfeiture remedy when applied to a high state official against the challenge of unconstitutionality based on the Tenth Amendment. Also, in light of *United Federal Workers of America* v. *Mitchell*, 330 U.S. 75, the private interests of Palmer in his employment are not constitutionally affected by the Hatch Act remedy.

One additional argument is made on the question of the alleged unconstitutionality of the Hatch Act. Plaintiffs argue that to apply sec. 12 of the Hatch Act to the facts of the instant case would be to deny to the citizens of Illinois a republican form of government in violation of Article IV, Section 4 of the Constitution of the United States. Plaintiffs insist this is true if a single state officer

can determine for himself, by not resigning, whether his state shall or shall not receive federal funds for a two-year period.

No case is cited by plaintiffs concerning a republican form of government. In fact, plaintiffs admit there are no authorities directly in point. Plaintiffs do not point out the manner in which they claim a republican form of government is disturbed by the enforcement of the Hatch Act except for the general statement hereinbefore quoted. Ignored are statements of the United States Supreme Court such as in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 where, in commenting on policy concerning the maintenance of a republican form of government, the Court said, at page 589: "Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." We think the argument that the Hatch Act is invalid because it denied the citizens of Illinois a republican form of government is entirely without merit.

We also hold that the *de minimis* rule is inapplicable under the circumstances of this case. Palmer was the highest state official responsible for the conservation affairs of the State of Illinois. He had administrative supervision of all nine Divisions of the Department of Conservation. At least six of such Divisions conducted activities to which federal contributions had been made. Palmer was responsible for major policy decisions which had to be made at state level. He initially approved the project plan and report for each federal aid project. By state law, he was given specific responsibility for the state development of Federal-Grant-in-Aid-projects. His duties in connection with federally financed activities took up at least fifty percent of his time. Palmer plainly met the test that his "principal employment" was "in connection with any activity which is financed in whole or in part by loans or grants made by the United States or any Federal agency."

It is of interest to note that the decision of the District Court in the instant case was strongly relied on by the

plaintiffs in the case of *Engelhardt and State of Alabama v. United States Civil Service Commission*, M.D.Ala., 197 F.Supp. 806. The District Court rejected the contentions of the plaintiffs in that case, which were practically identical with the contentions raised in the case at bar. The Court stated, at page 812: "Any contrary reasoning or conclusion in the *Palmer* case is specifically rejected by this Court. . . ."

The judgment of the District Court herein must be and is reversed with instructions to affirm the determination of the Commission.

REVERSED AND REMANDED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX II.

In the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION OF THE COURT

This case is here on appeal from an Order of the United States Civil Service Commission. The State of Illinois and Glenn D. Palmer, Director of Conservation of the State of Illinois, perfect the appeal from the Order.

The Commission issued its "Letter of Charges" to the State of Illinois and Glenn D. Palmer, in which it charges that it was in receipt of information which warranted it, under the provisions of Section 12 of the Act of August 2, 1939, as amended July 19, 1940, 54 Stat. 767 (U.S. Code, Title 5, Section 118k), in making an investigation of improper political activities of Glenn D. Palmer, Director of Department of Conservation, State of Illinois. The "Letter" stated that the term "Republican Party" means a political party whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected; the term "political campaign" means the political campaign of a candidate for nomination by, or election as the candidate for nomination by, or election as the candidate of, a political party as defined above, and the term "political management" means the management of a political campaign as defined above. The "Letter of Charges" is dated June 9, 1958, and it charged as follows:

I

That Glenn D. Palmer has been employed by the Department of Conservation, State of Illinois, since Jan. 28, 1953.

II

That by virtue of said employment his principal employment is in connection with an activity, the Department of

Conservation, State of Illinois, which is financed in whole or in part by loans and grants made by the United States.

III

That while so employed the said Glenn D. Palmer took an active part in political management and in political campaigns in that:

(a) The said Glenn D. Palmer has served as precinct committeeman and Chairman of the Kendall County Republican Committee, Kendall County, Illinois, from Jan. 28, 1953, to the present.

(b) The said Glenn D. Palmer did file Primary Petitions for Precinct Committeeman of the Republican Party with the County Clerk, Kendall County, Illinois, on Jan. 18, 1954, and Jan. 16, 1956, and as a result thereof was a candidate for and elected to that position in the primary elections of April 13, 1954, and April 10, 1956.

(c) The said Glenn D. Palmer did solicit signatures on his own behalf on a primary petition for Precinct Committeeman of the Republican Party in the town of Bristol, Kendall County, Illinois, for the primary election held on April 8, 1958.

(d) The said Glenn D. Palmer did file with the County Clerk, Kendall County, Illinois, a Primary Petition for Precinct Committeeman of the Republican Party and an Oath and Statement of Candidacy for the Primary election of April 8, 1958.

(e) The name of Glenn D. Palmer did appear on the ballot as a candidate for and the said Glenn D. Palmer was elected as a Republican Party Precinct Committeeman, Bristol Township, Kendall County, Illinois, in the Primary election of April 8, 1958.

IV

That the acts herein described on the part of Glenn D. Palmer are in violation of Section 12a and Section 15 of the Act of Aug. 2, 1939, as amended.

This letter was dated and signed in Washington, D.C. by the Assistant General Counsel of the U. S. Civil Service Commission, and was duly served on the respondents, the State of Illinois and Glenn D. Palmer.

The State of Illinois and Glenn D. Palmer filed answers to the "Letter of Charges"; issue was joined, and the matter came on for hearing before the U.S. Civil Service Commission.

Glenn D. Palmer entered into a stipulation with the Commission at the hearing, the effect of which admits the political activity described in Paragraph III of the "Charges". This stipulation was entered into on Sept. 3, 1958, and later on Oct. 24, 1958, a further stipulation was made in which it was agreed that Glenn D. Palmer has held the office of Director of Conservation of the State of Illinois from Jan. 28, 1953, to the present, and that the salary of the Director of Conservation of the State of Illinois is $12,000 per annum.

The United States Civil Service Commission made its case by three witnesses, James H. Wilder, a bookkeeper in the Treasurer's office of the State of Illinois; Francis A. Whitney, Supervisor of Accounting in the Department of Conservation; and Sam A. Parr, Administrative Assistant in the Department of Conservation of the State of Illinois, all of whom developed the facts on which the Commission entered its order against Glenn D. Palmer and the State of Illinois.

The facts show that all monies spent by the Department of Conservation are appropriated by the General Assembly of Illinois, the Legislative Branch of the State Government; that no federal money is spent by the Department, the Department only spending money in accordance with monies appropriated to it by the General Assembly. This is in accordance with the Constitution of the State of Illinois, which provides, in Article IV, Sec. 17 and 18, as follows:

> SEC. No money shall be drawn from the treasury except in pursuance of an appropriation made by law and on the presentation of a warrant issued by the auditor thereon; and no money shall be diverted from

any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution . . .

Sec. 18. Each general assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, the aggregate amount of which shall not be increased without a vote of two thirds of the members elected to each house, nor exceed the amount of revenue authorized by law to be raised in such time; and all appropriations, general or special, requiring money to be paid out of the state treasury, from funds belonging to the State, shall end with such fiscal quarter . . .

Thus, under the above quoted sections, the General Assembly must, every two years, appropriate all money spent in running State government. This money can only be withdrawn from the State treasury on a voucher issued by the Auditor of Public Accounts.

The facts further show that there are nine divisions in the Department of Conservation, namely, the Division of Park Memorials, Forestry, Fisheries, Game, Game Management, Engineering, Law, Education and the General Office; that all the Divisions in the Department of Conservation are financed through the Game Fund except Engineering, Parks and Forestry. All divisions are administered by the Director. The Director's duties are full time. The duties that the Director is required to fill are almost a two man job. The size of the Department requires of him sixty hours a week to handle the work. He is a member of from nine to twelve committees; is required to run the administrative staff, and to administer the entire conservation program, including the ramifications of the entire nine divisions. He must travel throughout the State and out of the State on conservation business; that within the Department there are ten to twelve boards, commissions and councils which the Director, under statutory duties, must run. In addition to the statutory

duties, other duties are planning of lakes, acquisition of land, engineering, stocking of lakes, thirty memorials and forty-five parks to be looked after, plus two conservation areas, new picnic areas to be looked after, new additions to buildings to be supervised; new buildings in process of erection to be supervised, the collection of admission fees, new highway construction to lake areas, construction of lakes, game propagation, many game farms, the rearing, raising and distribution of game birds, supervising personnel, personal interviews with fish and game enthusiasts, requests for stocking of fish to be disposed of and the delivery of fish to lake areas, experimental work with new species of game birds for Illinois, development of game propagation lands, forestry and nursery developments, distribution of trees to the public, accounting in connection with all projects, preparation of budgets, educational film service, public relations work, filling speaking engagements at public fish and game meetings. He must also meet the public who come to his office on conservation matters. These duties are all required by State Law. In addition to these duties, he also has duties with Federal Aid projects, and included among these are the setting up of various developments and new projects and those that might come under federal aid are submitted by the Department to federal governmental agencies for approval and then turned over to the coordinator, a State employee, who must have his name submitted to and his appointment approved by the Federal Government, after which appointment he handles all such projects and from time of approval he takes over and does the departmental work on these projects. This is done under the rules and regulations of the Bureau of Sports, Fisheries and Wild Life, a division of the United States Department of the Interior. The Department of Conservation has had such a coordinator since 1942.

The duties of the coordinator are to take the project or projects over and carry through until completion, and after completion send the reports in to the Federal Government for reimbursement so that the State of Illinois can recover the monies appropriated by the General Assembly.

The record further shows that all money spent on these projects is State money, appropriated by the General Assembly. The requests for reimbursement are prepared by the coordinator and signed by the Director. State regulations require this. The agreement between the State and the federal agency requires that the coordinator is to be in principal control of all Federal Aid projects. The rules of the Federal Agency that require this are in the Federal Aid in Fish and Wildlife Manual, Section 170, Paragraphs 171.1 through 172.1, which, in brief, provide for the appointment of the coordinator and that he will serve as the principal administrative head of the Federal Aid Program and be responsible therefor through completion.

These various programs are provided for under the following Federal Acts, namely, Pittman-Roberston, Dingell-Johnson Act, and the Clarke-McNary Act.

The Pittman-Robertson Act, 16 U.S.C.A. 669, provides as follows:

> The Secretary of the Interior is authorized to cooperate with the States, through their respective State fish and game departments, in wild life-restoration projects as hereinafter in sections 669-669b, and 669c-669i of this title set forth; but no money apportioned under said sections to any State shall be expended therein until its legislature, or other State agency authorized by the State constitution to make laws governing the conservation of wildlife, shall have assented to the provision of said sections and shall have passed laws for the conservation of wildlife which shall include a prohibition against the diversion of license fees paid by hunters for any other purpose than the administration of said State fish and game department, except that, until the final adjournment of the first regular session of the legislature held after September 2, 1937, the assent of the Governor of the State shall be sufficient. The Secretary of the Interior and the State fish and game department of each State accepting the benefits of said sections, shall agree upon the wildlife-restoration projects to be aided in such State under the

terms of said sections and all projects shall conform to the standards fixed by the Secretary of the Interior. Sept. 2, 1937, c. 899, Sec. 1, 50 Stat. 917; 1939 Reorg. Plan No. II, Sec. 4(f), eff. July 1, 1939, 4 F.R. 2731; 53 Stat. 1433.

It is under this Section and the other provisions of the Act that Congress has made available funds received from taxes laid on firearms, shells and cartridges, to the Secretary of the Interior for use by him in cooperation with the States for wildlife restoration.

The Dingell-Johnson Act, 16 U.S.C.A., Sec. 777, is in the same language as the quoted provision above except that the available tax revenue to create the fund is received from taxes laid on fishing rods, creels, reels, and artificial lures, baits and flies for fish restoration and management projects.

The Clarke-McNary Act, 16 U.S.C.A., Sec. 563, provides as follows:

> The Secretary of Agriculture is authorized, and on such conditions as he deems wise, to stipulate and agree with any State or group of States to cooperate in the organization and maintenance of a system of fire protection on any private or State forest lands within such State or States and situated upon the watershed of a navigable river. No such stipulation or agreement shall be made with any State which has not provided by law for a system of forest-fire protection. In no case shall the amount expended in any State exceed in any fiscal year the amount appropriated by that State for the same purpose during the same fiscal year.

16 U.S.C.A., Sec. 564, provides as follows:

> The Secretary of Agriculture is authorized and directed, *in cooperation with appropriate officials of the* various States or other suitable agencies, to recommend for each forest region of the United States such systems of forest-fire prevention and suppression as will adequately protect the timbered and cut-over lands therein with a view to the protection of forest and water re-

sources and the continuous production of timber on lands chiefly suitable therefor.

16 U.S.C.A., Sec. 565 (b), provides as follows:

The Secretary of Agriculture is authorized, subject to such conditions as he may prescribe to transfer, without reimbursement or at such prices and upon such terms as he may impose, to States and political subdivisions or agencies thereof fire lookout towers and other structures or improvements used by the Forest Service for fire prevention or suppression purposes, and the land used in connection therewith if such land is outside national forest boundaries when they are no longer needed by the Forest Service for such purposes but are of value to the State or political subdivision or agency thereof in its fire protection system: *Provided*, That if any property so transferred is not put to use for the purpose for which it was transferred within two years from the date of transfer, or if, within fifteen years from the date of transfer, any such property should cease to be used for the purpose for which it was transferred for a period of two years, title thereto shall revert to and immediately revest in the United States.

16 U.S.C.A., Sec. 567, provides as follows:

The Secretary of Agriculture is authorized and directed to cooperate with the various States in the procurement, production, and distribution of forest tree seeds and plants, for the purpose of establishing forests, windbreaks, shelter belts, and farm wood lots upon denuded or nonforested lands within such cooperating States, under such conditions and requirements as he may prescribe to the end that forest-tree seeds or plants so procured, produced, or distributed shall *be used effectively for planting denuded or nonforested* lands in the cooperating States and growing timber thereon. The amount expended by the Federal Government in cooperation with any State during any fiscal year for such purposes shall not exceed the amount expended by the State for the same purposes

during the same fiscal year, and the Secretary of Agriculture is authorized to make expenditures on the certificate of the State official having charge of the cooperative work for the State that State expenditures as provided for in this section have been made. There is authorized to be appropriated to enable the Secretary of Agriculture to carry out the provisions of this section not more than $1,000,000 for the fiscal year ending June 30, 1950; $1,500,000 for the fiscal year ending June 30, 1951; $2,000,000 for the fiscal year ending June 30, 1952; and $2,500,0000 for each subsequent fiscal year.

16 U.S.C.A., Sec. 567(a), provides as follows:

For the purpose of stimulating the acquisition, development, and proper administration and management of State forests and of insuring coordinated effort by Federal and State agencies in carrying out a comprehensive national program of forest-land management, the Secretary of Agriculture is authorized to enter into cooperative agreements with appropriate officials of any State or States for acquiring in the name of the United States, by purchase or otherwise, such forest lands within the cooperating State as in his judgment the State is adequately prepared to administer, develop, and manage as State forests in accordance with the provisions of this section and section 567(b) of this title, and with such other terms not inconsistent therewith as he shall prescribe, such acquisition to include the mapping, examination, appraisal, and surveying of such lands and the doing of all things necessary to perfect title thereto in the United States: *Provided*, That, since it is in the national interest to modify, limit, or change in any manner whasoever the future ownership and administration by the United States of existing national forests and related facilities, or hereafter to restrict or prevent their extension through the acquisition by purchase or otherwise of additional lands for any national forest purpose: *Provided further*, That

this section and section 567(b) of this title shall not be construed to limit or repeal any legislation authorizing land exchanges by the Federal Government, and private lands acquired by exchange within the limits of any area subject to a cooperative agreement of the character herein authorized shall hereafter be subject to the provisions of this section and section 567(b) of this title.

16 U.S.C.A., Sec. 567 (b), provides as follows:

No cooperative agreement shall be entered into or continued in force under the authority of section 567(a) of this title or any land acquired under sections 567(a)-567(c) of this title turned over to the cooperating State for administration, development, and management unless the State concerned, as a consideration for the benefits extended to it thereunder, complies in a manner satisfactory to the Secretary of Agriculture with the following conditions and requirements which shall constitute a part of every such agreement:

(b) In order to insure a stable and efficient organization for the development and administration of the lands acquired under sections 567(a)-567(c) of this title, the State shall provide for the employment of a State forester, who shall be a trained forester of recognized standing.

(c) The Secretary of Agriculture and the appropriate authorities of each cooperating State shall work out a mutually satisfactory plan defining forest areas within the State which can be most effectively and economically administered by said State, which plan shall constitute a part of the cooperative agreement between the United States and the State concerned: *Provided*, That nothing herein shall be held to prevent the Secretary of Agriculture from later agreeing with the proper State authorities to desirable modifications in such plan.

(d) No payment of Federal funds shall be made for land selected for purchase by the United States under sections 567(a)-567(c) of this title until such proposed

purchase has been submitted to and approved by the National Forest Reservation Commission created by section 513 of this title.

(e) Subject to the approval of the National Forest Reservation Commission, the Secretary of Agriculture is authorized to pay out of any available money appropriated for carrying out the purposes of sections 567(a)-567(c) of this title any State, county, and/or town taxes, exclusive of penalties, due or accrued on any forest lands acquired by the United States under donations from the owners thereof, and which lands are to be included in a State or other public forest pursuant to said sections.

(f) The State shall prepare such standards of forest administration, development, and management as are necessary to insure maximum feasible utility for timber production and watershed protection, and are acceptable to the Secretary of Agriculture and shall apply the same to lands acquired and placed under the jurisdiction of the State pursuant to sections 567(a)-567(c) of this title.

(g) That with the exception of such Federal expenditures as may be made for unemployment relief, the State shall pay without assistance from the Federal Government the entire future cost of administering, developing and managing all forest lands acquired and over which it has been given jurisdiction under sections 567(a)-567(c) of this title.

(h) During the period any cooperative agreement made under sections 567(a)-567(c) of this title remains in force, one-half of the gross proceeds from all lands covered by said agreement and to which the United States holds title shall be paid by the State to the United States and covered into the Treasury. All such payment shall be credited to the purchase price the State is to pay the United States for said land, such purchase price to be an amount equal to the total sum expended by the United States in acquiring said lands.

Upon payments of the full purchase price, either as herein provided or otherwise, title to said lands shall be transferred from the Federal Government to the State, and the Secretary of Agriculture is authorized to take such action and incur such expenditures as may be necessary to effectuate such transfer.

(j) The State shall furnish the Secretary of Agriculture with such annual, periodic, or special reports as he may require respecting the State's operations under its agreement with him.

(k) When a State or political unit thereof acquires under tax delinquency laws title to forest lands without cost to the United States and which lands are included within a State or other public forest, the Secretary of Agriculture, on behalf of the Federal Government, may contribute annually out of any funds made available under section 567(c) of this title not to exceed one-half of the cost of administering, developing, and managing said lands.

16 U.S.C.A., Sec. 568, provides as follows:

The Secretary of Agriculture is authorized and directed, in cooperation with the land grant colleges and universities of the various States, or in his discretion, with other suitable State agencies, to aid farmers through advice, education, demonstrations, and other similar means in establishing, renewing, protecting, and managing wood lots, shelter belts, windbreaks, and other valuable forest growth, and in harvesting, utilizing and marketing the products thereof. Except for preliminary investigations, the amount expended by the Federal Government under this section in cooperation with any State or other cooperating agency during any fiscal year shall not exceed the amount expended by the State or other cooperating agency for the same purpose during the same fiscal year, and the Secretary of Agriculture is authorized to make expenditures on the certificate of the appropriate State official that the State expenditures, as provided for in this section,

have been made. There is authorized to be appropriated annually out of any money in the Treasury not otherwise appropriated, not more than $500,000 to enable the Secretary of Agriculture to carry out the provisions of this section.

16 U.S.C.A., Sec. 568(c), provides as follows:

The Secretary of Agriculture is authorized to cooperate with State foresters or equivalent officials of the several States, Territories and possessions for the purpose of encouraging the States, Territories, and possessions to provide technical services to private forest landowners and operators, and processors of primary forest products with respect to the management of forest lands and the harvesting, marketing, and processing of forest products, and where necessary to avoid uneconomic duplication of certain technical and training services, to make such services available to private agencies and persons. All such technical services shall be provided in each State, Territory, or possession in accordance with a plan agreed upon in advance between the Secretary and the State forester or equivalent official of the State, Territory or possession. The provisions of Sections 568(c) and 568(d) of this title and the plan agreed upon for each State, Territory or possession shall be carried out in such manner as to encourage the utilization of private agencies and individuals furnishing services of the type described in this section.

16 U.S.C.A., Sec. 568(e), provides as follows:

(a) The Congress finds and declares that building up and maintaining a level of timber growing stock adequate to meet the Nation's domestic needs for a dependable future supply of industrial wood is essential to the public welfare and security; that assisting in improving and protecting the more than fifty million acres of idle non-Federal and Federal lands for this purpose would not only add to the economic strength of the Nation, but also bring increased public benefits

from other values associated with forest cover; and that it is the policy of the Congress that the Secretary of Agriculture in order to encourage, promote, and assure fully adequate future resources of readily available timber should assist the States in undertaking needed programs of tree planting.

(b) Any State forester or equivalent State official may submit to the Secretary of Agriculture a plan for forest land tree planting and reforestation for the purpose of effecting the policy hereinbefore stated.

(c) When the Secretary of Agriculture has approved the plan, he is authorized and directed to assist the State in carrying out such plan, which assistance may include giving of advice and technical assistance and furnishing financial contributions: Provided, That, for the non-Federal forest land tree planting and reforestation, the financial contribution expended by the Federal Government during any fiscal year to assist the State to carry out the plan shall not exceed the amount expended by the State for the same purposes during the same fiscal year, and the Secretary of Agriculture is authorized to make financial contributions on the certificate of the State official in charge of the administration of the plan as to the amount of expenditures made by the State.

(d) In any plan that coordinates forest lands under the jurisdiction of any Federal agency other than the Department of Agriculture, the Secretary of Agriculture shall obtain the cooperation and assistance of the Federal agency having jurisdiction and the appropriate State forester in the approval and carrying out of the plan.

(e) The Secretary of Agriculture may prescribe such rules and regulations as may be appropriate to carry out the purposes of this section.

* * * * * *

This Act gives consent of Congress to each of the several states to enter into any agreement or compact, not in conflict

with any law of the United States, with any other state or states for the purpose of conserving forests, etc. This Act is to be carried out by the United States Secretary of Agriculture.

Each of the Acts contemplates an agreement on the part of Congress with each or any of the States to enter into cooperative agreements to accomplish the respective purposes therein provided for.

The General Assembly of Illinois has enacted legislation as required by the respective Acts to enable cooperation on the part of the State insofar as its constitutional powers permit it to do. This Section 63b, Chapt. 127, I.R.S. 1959, which provides as follows:

> SEC. 63c. The Department of Conservation further shall have the power and authority to enter into agreements with appropriate federal agencies, in order to better effect cooperative undertakings in the conservation, preservation, distribution and propagation of fish, mussels, frogs, turtles, game, wild animals, wild fowls, birds, trees, plants and forests.

This is the section of Illinois law that enables the State to enter into contracts with Federal agencies as provided in the three Federal Acts above mentioned. The record shows that contracts were made with the United States Interior Department for fish and game purposes and with the United States Agricultural Department for forestry purposes. The record further shows that federal aid projects are paid for with funds appropriated by the General Assembly of Illinois, and that after projects are completed the State is reimbursed for the federal portion of the project in accordance with the percentages as provided in the respective Federal Acts, and that the federal funds are then paid into the State Treasury upon order of the Auditor of Public Accounts and there remain until the General Assembly reappropriates funds. The federal money received in reimbursement cannot again be withdrawn except upon its appropriation by the General Assembly. It thus appears that in the first instance the monies that are spent by the "De-

partment" here involved is all state money, and that the "Department" is really a mere agency through which federal funds are channelled into the State treasury in accordance with the contracts made as aforementioned.

It further appears from the record that the only projects that the Director has to be concerned with are those contemplated under the contractual agreements entered into with the United States Interior Department over fish and wildlife. The forestry programs entered into with the United States Department of Agriculture are conducted by the State Forester, who, under Illinois law, is appointed by the Director, who must qualify with the Federal Agency, and that after the State Forester is appointed and qualified the Director has no further control over him.

It further appears from the record that the total amount of federal funds channelled into the State Treasury over the six-year period in question is $2,263,661.20, and that the General Assembly appropriated for the Department, during the same period, the sum of $35,975,405.21. The record for the monies received under the three Federal Acts breaks down as follows:

Pittman-Robertson, $1,438,349.52; Dingell-Johnson, $449,225.39, and Clarke-McNary, $376,086.29. The first is reimbursement of 4%; the second is reimbursement of 1.25%; and the third is reimbursement of 1.05% to the States of the monies appropriated to the Department of Conservation during the six-year period under the respective contracts.

The record also shows that the "Director" devoted less than 1% of his time to the projects for which the State was reimbursed during the six-year period, except none to forestry.

The "Director" stated that in all the past history of the Department, the Hatch Act had never been applied to his office; that he was appointed to his office by the Governor, the appointment was confirmed by a majority vote of the State Senate; that his appointment ran for two years at a time and that the Governor could remove him only with

cause, as provided in Article V, Section 12 of the Illinois Constitution.

The State of Illinois and Glenn D. Palmer raised the question of the constitutionality of Section 12(a) of the Hatch Act at the hearing. R. Page 9. The other questions raised in the record are that the Department of Conservation is not an activity financed in whole or in part by the Federal Government; that neither of the respondents are able to determine from the meaning of Section 12 what is meant by the term "loan or grant", because the terms are not defined in Section 12; that Section 12(a) provides certain exemptions to State employees or officers from the operation of the Hatch Act which applies to elected heads of executive departments of the State who are not covered by the merit or Civil Service system or program, and it becomes apparent that when the exemption is read, together with other exemptions under Section 12(a), the phrase "duly elected" should be interpreted in a broad sense to include "appointed or selected officials", which is a statutory construction problem, the deminimis rule, and because of the discriminatory exemptions provided for federal executive officers when the same exemptions are not given to State equivalent executive officers. R. pp. 8-10.

After full hearing the Commission hearing officer found that the respondent, Glenn D. Palmer, Director of the Department of Conservation, is found to have engaged in political activities clearly in violation of Sec. 12(a) of the Hatch Act, provided that he was subject thereto; that the State of Illinois received substantial grants from the United States for the benefit of the Department of Conservation; that the Director of the Department of Conservation is not the elected head of an executive department; and finally, in recognition of the defense de minimis non curat lex, the respondent, Palmer, should not be held accountable in this proceedings for political activities. The Commission refused to accept the recommendation of the hearing officer as to the de minimis doctrine and held that it was inapplicable in this case. The Commission affirmatively found that Glenn D. Palmer violated Section 12(a) of the Hatch Political Activi-

ties Act as alleged in the "Letter of Charges", and that his removal from the position of Director of the Department of Conservation (which ineligibility for reemployment by the State of Illinois within 18 months) is warranted. The order was duly entered of record, and this appeal therefrom perfected.

It is necessary for the Court to examine the record in detail as has been done and to apply the law in the light of all the legal questions raised.

Section 12(a) of the Hatch Act, also designated Section 118K, Title 5, U.S.C.A., and found at 54 St. Ct. 767, is as follows:

> 118K. Employees of State or local agencies financed by loans or grants from United States—Influencing elections; officers or employees defined.
>
> (a) No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal Agency shall (1) use his official authority or influence for the purpose of interfering with an election or nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any such officer or employee to pay, lend or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political campaigns. All such persons shall retain the right to vote as they may choose, and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or Lieutenant Governor of any state, or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a

State or municipal merit or civil service system; (3) officers holding elective offices.

Section 118K(b) provides for hearing for any violation of 118K(a) by the "Commission" and the requisite procedure, by notice to the offender, setting forth the alleged violation and the time and place for hearing and after hearing for the entry of an order finding the violation and fixing the penalty. The penalty clause of Subsection (b) provides:

> After such hearing, the Commission shall determine whether any violation of such subsection has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it was committed from his office or employment, and shall, by registered mail, notify such officer or employee and the appropriate State or local agency of such determination.

If the officer or employee is not discharged within 30 days, the Commission is to certify to the Federal Agency supplying money on order requiring it to withhold from its loans or grants to the State "an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation", all of which must be done by the Commission. Notice of the order must be sent by registered mail, and the order of the "Commission becomes final upon the expiration of thirty days after the mailing of notice except as provided in Subsection (c). This Subsection (c) provides for appeal to the District Court the Court to review on the entire record, including all of the evidence taken on the hearing, and shall extend to questions of fact and law. This subsection further provides:

> The Court shall affirm the Commission's determination or order * * * if the court determines that the same is in accordance with law. If the court determines that any such determination or order * * * is not in accordance with law, the court shall remand the proceedings to the Commission with directions either to make such determination or order as the court shall determine to be in accordance with law or to take such

further proceedings as, in the opinion of the court, the law requires.

During the course of respondent Palmer's directorship there was in full force and effect the following provisions of the Constitution of Illinois, viz:

Article V, Sec. 6—Constitution of 1870

SEC. 6. The Supreme Executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.

SEC. 10. The governor shall nominate, and by and with the advice and consent of the Senate, (a majority of all the senators elected concurring by yeas and nays) appoint all officers who offices are established by this constitution, or which may be created by law and whose appointment or election is not otherwise provided for: and no such officer shall be appointed or elected by the general assembly.

SEC. 12. The governor shall have power to remove any officer whom he may appoint in case of incompetency, neglect of duty, or malfeasance in office; and he may declare his office vacant, and fill the same as herein provided in other cases of vacancy.

SEC. 23. The officers named in this Article shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms . . .

SEC. 24. Definition and Oath of Office. An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected, or appointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished.

SEC. 25. All civil officers, except members of the general assembly and such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the fol-

lowing oath or affirmation: "I do solemnly swear (or affirm as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of————according to the best of my ability.

And no other oath, declaration or test shall be required as a qualification.

Articles IV, Section 1 of the Constitution of Illinois, provides:

> The legislative power shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people.

In pursuances of this constitutional power, the General Assembly, in the year 1917, and as subsequently amended, passed the "Civil Administrative Code", providing for the creation of departments of State government. This code is found at Chapt. 127, State Government, I.R.S., 1959, p. 1803. This Code, by Section 2, provides:

> SEC. 2. The word "department" as used in this Act shall, • • • mean the several departments of the State Government as designated in Section 3 of this Act and none other.

Section 3 provides for fifteen departments of State government. Among these is the Department of Conservation. Sec. 4 of the Act provides:

> Each department shall have an officer at its head who shall be known as a director and who shall • • • execute the powers and discharge the duties vested by law in his respective department. The following officers are hereby created: • • • Among others are: Director of Conservation, for the Department of Conservation • • • Director of Personnal for the Department of Personnel.

It is thus apparent that under the constitutional provisions and the laws enacted pursuant thereto that respondent

Palmer is a State officer, and not a State employee. His appointment came from the "Supreme Executive power", the Governor. The office was created by the General Assembly, in which the Illinois Constitution vests the legislative power to enact laws and create the office by the enactment of laws.

The qualifications of the Director of Conservation are not prescribed by the Code. Section 11 of the Code provides:

> Each officer provided for by this Act shall perform such duties as may be prescribed by law for his position and to the best of his ability shall render faithful and efficient service in the performance of his duties, to the end that the public interest and welfare may be furthered.

Section 12 of the Code provides that the appointment of all officers created by the Code shall be made by the Governor, by and with the advice and consent of the State Senate. Sec. 13 provides a term of office of two years. Sec. 14 provides for the constitutional oath of office. Sec. 15 provides for a bond and Sec. 20 authorizes the employment of necessary employees. Nothing in the Act provides that respondent Palmer shall not be a precinct committeeman, nor is there any provision in the Act that prevents him from being a political party county chairman. There is only one office created by the Code which requires freedom from political activity, and that is the office of Director of Personnel. Sec. 63b 105 of the Administrative Code provides the qualifications of the Director of the Department of Personnel. This Section provides:

> 63b 105. The Department of Personnel shall have an officer at its head who shall be known as the Director of Personnel. He shall be appointed by the Governor, by and with the advice and consent of the Senate, as provided in the Civil Administrative Code of Illinois, and shall be subject to the provisions of that Code, except as herein otherwise provided. The Director of the Department of Personnel shall be a person who shall have had practical working experi-

> ence in the field of personnel administration. The Director shall be selected for appointment from among those persons who, for the two years next preceding the appointment, have not been members of any local, state or national committee of any political party, or officers or members of standing committees of any partisan political group or organization. Nor shall the appointee, during his tenure as Director of Personnel, become a member of any local, state or national committee of a political party, or an officer or member of standing committee of any partisan political group or organization.

The Illinois Personnel Code, under Sec. 63B104c(7), (Sec. 4c) of the Code, I.R.S., Vol. II 1959, Chapt. 127, specifically exempts "Directors of Departments * * * and all other positions appointed by the Governor by and with the consent of the Senate from the provisions of the Personnel Code.

The public policy of Illinois, as declared by its law in respect to political activity, is different from the policy as declared in Sec. 12 (118k) known as the Hatch Act. The Hatch Act Section in question states among other things,

> No such officer * * * shall take any active part in political management or in political campaigns * * * For the purpose of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or Lieutenant Governor of any State, or any person who is authorized by law to act as Governor, or the Mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil service system; (3) officers holding elective offices.

It is apparent that the respondent is excluded from the exempting clause for the reason that he is not an "elected officer."

Illinois, in further pursuance of its public policy by its General Assembly, adopted "An Act Concerning Elec-

tions", and it is known as the "Election Code" of 1943. This Code is found at Chapt. 46, Elections, I.R.S. of 1959, Vol. I, p. 1845. This Code provides in detail matters concerning elections. Article 7, Sec. 1 of the Code covers the nomination of all elective candidates, and included in this Section are the candidates of "precinct, township, ward and State Central Committeemen." The Code also provides a means governing the management of a multi-party system. Article 7, sec. 2, defines political parties. Article 7, Sec. 8b provides for the election of a precinct committeeman of each party, and Article 7, Sec. 8c provides for the County Central Committee. Article 7, Sec. 9 provides for the convening of the County Central Committee, and its procedures for the election of a County Chairman of each political party. This provides for an orderly system of political party management.

From the standpoint of the public policy of Illinois, as declared by its Constitution and public laws, it is readily apparent that respondent Palmer has violated no law of Illinois. The record shows that he is engaged in a pursuit from which he is paid a salary of $12,000.00 per year. In addition to his salary he is also entitled to pension rights under Illinois law, entitled "An Act to provide for the creation, maintenance and administration of a retirement and benefit system for certain officers and employees of the State of Illinois, their dependents and beneficiaries." Approved July 23, 1943. I.R.S., 1959, Vol. II, Chapt. 127, State Government, Secs. 215 through 246. This statute among other things, provides for benefits to be computed on length and continuity of service. Sec. 220.

The Hatch Act authorizes the Commission to make a finding that the political activity warrants the removal of the officer, and after notice to the officer and the State of such finding, and a failure to so remove such officer within 30 days, the Commission shall certify to the Federal Agency involved this fact, whereupon the Federal Agency shall withhold an amount equal to two years' compensation at the rate such officer was receiving at the time of such violation, in this instance $24,000.00. The record shows that the pro-

ject or projects have been completed and paid for with money of Illinois. Illinois raises its funds through taxation of its citizens as provided for by Illinois law.

There is no provision of Illinois law that authorizes the suspension of an officer for eighteen months, nor is there any specific Illinois law that provides for the discharge of a State officer for a period of eighteen months. The Director of Conservation is appointed by the Governor for a period of two years, by and with the advice and consent of the Illinois State Senate, and after confirmation, is to hold office for that term.

There are only two ways by which a State officer of Illinois can be removed from office. One is by impeachment and trial, as provided by Article IV, Sec. 24, Illinois State Constitution, Ill. Revised Statutes, 1959, Vol. 1, p. 12, which provides as follows:

> IMPEACHMENT. SEC. 24. The House of Representatives shall have the sole power of impeachment, but a majority of all the members elected must concur therein. All impeachments must be tried by the Senate; and when sitting for that purpose, the Senators shall be upon oath, or affirmation, to do justice according to law and evidence * * * No person shall be convicted without the concurrence of two-thirds of all the Senators elected. But judgment in such cases, shall not extend further than removal from office, and disqualification to hold any office of honor, profit or trust under the government of this State * * *

This provision of the Constitution does not provide the basis for returning a bill of impeachment, but it does provide that the senators shall be upon oath or affirmation to do justice according to law and evidence. The meaning generally ascribed to such provision is that impeachment proceedings generally lie as a rule for treason, bribery or any high crime or misdemeanor in office. Newsome v. Cocke, 44 Miss. 352, 7 Am. Rep. 686. The grounds must be causes attaching to the qualifications of the officer, or his performance of his duties, showing that he is not a fit and proper

person to hold the office. Maulton v. Scully, 111 Me. 428, 89 Atl. 944.

In State v. Hastings, 37 Nebr. 96, 55 N.W. 774, it is said:

> Where the act of official delinquency consists in the violation of some provision of the constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty, willfully done, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful or corrupt, it is a misdemeanor in office; but mere negligence or mere excess of power without corrupt intention is not a "crime or misdemeanor" for which the officer should be impeached.

The Illinois Constitution provides, under Article V, Sec. 15:

> SEC. 15. The governor and all civil officers in this State shall be liable to impeachment for any misdemeanor in office.

Thus in Illinois impeachment lies only for misdemeanor in office.

It is to be noticed here that there is no showing that any public funds, either Illinois or Federal, have been wasted through any political activity, or that the public has in any way been prejudiced. In fact, the rules and regulations which are included in the record amply protect the expenditure of any funds used and expended in any of the cooperative projects here involved from waste or misuse of any kind of type. The projects must be approved by either the Secretary of the Interior or the Secretary of Agriculture, and it must be shown that economy and efficiency in the completion of the projects were attained; on contracts entered into by the State, competitive bidding must be allowed. The State is required to maintain "an adequate and competent force of employees to initiate and carry projects through to satisfactory completion." The personnel are to be selected "on the basis of their competence to perform the services required, and shall conduct their duties in a man-

ner acceptable to the Secretary." The manual also provides that as to the selection of personnel employed on projects, "it should be the policy of every state to develop and maintain a staff of permanent employees, well qualified by training and experience to carry the programs forward in the highest degree of efficiency." Qualifications of all personnel to be employed in technical or responsible supervisory positions must be submitted to and approved by the Bureau. In case approval is not granted, Federal participation in payment of salaries and expenses will not be allowed. There is no question here of the violation of any rule laid down by the Federal government. In fact all rules and regulations must be obeyed or Federal funds will not be paid. It can hardly be said that any grounds exist for the filing of a bill of impeachment as against this State officer under Illinois law.

The other method for removal of a State officer is also provided in the State Constitution. Article V, Sec. 12 provides:

> The Governor shall have power to remove any officer whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office, and he may declare the office vacant and fill the same as herein provided in other cases of vacancy.

The Supreme Court of Illinois, in Wilcox v. The People, 90 Ill. 186, 204, in construing this section, has declared that power under the above section to remove exists in the governor for any one of the three causes specified in the following language:

> Undoubtedly the Governor can only remove for some one of the causes specified; but the removal here was for one of these causes—incompetency. The Governor ascertained the existence of the cause here, and made the removal on account of it. The Constitution is silent as to who shall ascertain the cause of removal or the mode of its ascertainment. It simply gives to the Governor the power to remove any officer whom he may appoint, in case of incompetency, etc. It follows, then,

> that it is with the Governor, who is to act in the matter to determine, himself, whether the cause of removal exists from the best lights he can get, and no mode of inquiry being prescribed for him to pursue, it rests with him to adopt that method of inquiry and ascertainment as to the charge involved which his judgment may suggest as the proper one, acting under his official responsibility, and it is not for the courts to dictate to him in what manner he shall proceed in the performance of his duty, his action not being subject to their revision. The Constitution of this State not only declares that the powers of the government of the State shall be divided into three distinct departments, but has expressly prohibited the exercise of any of the powers properly belonging to one by either of the others.

To the same effect, removal only for the causes specified, is Humphrey's Executor v. United States, 295 U.S. 602, 55 S. Ct. 869, 873.

Now the courts of Illinois can not act to require the Governor to make a finding because, as pointed out, the courts would be usurping a constitutional power that is wholly within the prerogative of the chief executive power, the governor of the state. Next examine the three causes, (1) incompetency, (2) neglect of duty, and (3) malfeasance in office. The record here shows no incompetency, no neglect of duty in the administration of the office, and no malfeasance in office. It only shows that he is a party precinct committeeman and a party county chairman. Both positions are provided for under the Illinois Election Code, and no Illinois law prohibits the Director of Conservation as such from acting in these party positions. The only Illinois department head who is restrained by law from holding such political party positions is the Director of Personnel. This restraint is provided for by Sec. 63b 105, Chapt. 127, State Government, I.R.S. 1959, p. 1929. Sec. 63b 104(7), of the same Chapter specifically exempts from the Personnel Code, "(7) Directors of Departments * * * and all other posi-

tions appointed by the Governor by and with the consent of the Senate." Thus, under Illinois law, and upon the complete showing in this record, no valid cause exists for removal unless it can be said that the order of the Civil Service Commission, an agency of the Federal Government, can require the Chief Executive of Illinois to exercise his prerogatives under the Illinois Constitution, when in fact no legal cause exists under Illinois law. The Congress of the United States under the separation of powers in the Federal Constitution cannot require the President of the United States to surrender any of his executive powers, Myers v. United States, 272 U.S. 52, 119, 125, 126, 161, nor can it do so to the Governor of Illinois.

Thus the Order of the Commission as rendered under the Hatch Act places Illinois in the anomalous position of being required to summarily discharge the Director of Conservation when, in fact, under Illinois law no such procedure for discharge is provided for. Illinois being unable to act, must therefore forfeit out of the moneys contracted with the Federal Agency, a sum equivalent to twice the annual salary of the Director, in this case, $24,000.00. The record in this case shows that Illinois, out of its tax appropriations, has spent the money on the completed project under all the requirements of the three acts of Congress above set out and in strict accordance with the regulations prescribed by the Federal Agency as found in this record. Illinois is bound by its own law. It can only act under the law. The moneys spent were appropriated by the General Assembly under the authority granted to it by the Illinois Constitution, Article IX, Sec. 1, which provides:

> The General Assembly shall provide such revenues as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, etc.

and by Article IV, Sec. 17, which provides:

> No money shall be drawn from the treasury except in pursuance of an appropriation made by law, and on presentation of a warrant issued by the Auditor

thereon; and no money shall be diverted from any appropriation made for any purpose or taken from any fund whatever, either by joint or spearate resolution.

Under these sections of the State Constitution the tax was levied and the appropriation made to carry out the various project purposes as contemplated by the three Federal Acts providing for the cooperative purposes joined by Illinois statutes authorizing the cooperative purposes as above pointed out. Where is Illinois to recover the $24,000.00 in question? It is faced with the Constitutional provision, Article IX, Sec. 1, authorizing the levy of the tax, and Article IV, Sec. 17, authorizing the appropriation and the manner in which it was drawn from the State Treasury to complete the project, expecting that the proportionate cooperative share of $24,000.00 would be repaid, yet it, on the failure of repayment, is also faced with the propostion that to make up the $24,000.00 under Article IV, Sec. 17, "that no money shall be diverted from any appropriation made for any purpose or taken from any fund whatever, either by joint or separate resolution." This can only mean one thing, that under the Illinois Constitution and Illinois law, the appropriated fund in question will be short to the extent of $24,000.00, if the Order of the Civil Service Commission is to stand. Illinois has one source of revenue to run the State Government and that comes from taxes levied on its citizens. Can it be said that the Hatch Act in this case only incidentally has an effect on certain activities within the State? No case of record, except Oklahoma v. United States Civil Service Commission, has ever so held and in this case the factual matters were not the same as in this case. First, Illinois has not yielded, nor has the Director yielded. Both have appealed from the decision of the Civil Service Commission, judicially asserting what they believe are their legal, constitutional rights. Secondly, as far as this Court is able to ascertain from a careful study of the opinions in the Court of Appeals and in the Supreme Court, this question here involved, that of an Act of Congress, striking at

the revenue of a state, was never raised. The Court in Oklahoma decides three questions, (1) that the United States has no power to regulate local political activities of state officials, (2) that it does have power to fix the terms upon which its money allotments to states shall be disbursed, and (3) that the Tenth Amendment does not forbid the exercise of the power in the way that Congress has proceeded. As to point one, there is no doubt and as to point three, the Tenth Amendment is not a source of power and cannot be relied upon as a grant of power. Power to act must be found in the grants of power as given to the United States. As to Point Two, "that Congress has power to fix the terms upon which its money allotments to states shall be disbursed", the Court did not have called to its attention any constitutional provision showing where the power came from, nor was any case shown or called to the attention of the Court that permitted Congress to pass any Act that struck at revenue or moneys of the State itself. The State of Illinois, as does the Federal Government, has the right as a prerogative of government, to hire and fire, its employees, and has the undoubted right to appoint, confirm and provide the qualifications for State officers free from control of the United States. See Cummings v. State of Missouri, 4 Wall 277, 18 L. Ed. 356, 361, where the Court announces the rule that it is well settled and generally recognized that there is a wide range of particular unexpressed powers which have been reserved to the States, such as, for illustration, the right to determine the qualifications for state officers and the conditions on which its citizens may exercise their various callings and pursuits within its jurisdiction. The federal and state governments can cooperate to a common end provided each of them is authorized to reach it. This cooperation must be effectuated by an exercise of the powers which they severally possess, and not by an exercise through invasion or surrender by one of them of the governmental power of the other. The power to remove executive officers appointed by the chief executive power is an executive function, and cannot be controlled by the legislative authority. This proposition of constitutional law is well established

under the decision of the Supreme Court in so far as the National government is concerned in the case of Myers v. United States, 272 U.S. 52, pp. 119, 125. The Court said, pp. 161, 164,

> Removal of executive officials from office is an executive function; the power to remove, like the power to appoint, is part of the "Executive power", a conclusion which is confirmed by the obligation "to take care that that the laws are faithfully executed."

The Court further said, pp. 119, 125—

> The President is empowered by the Constitution to remove any executive officer appointed by him by and with the advice and consent of the Senate, and this power is not subject in its exercise by the assent of the Senate, nor can it be made so by an Act of Congress.

Again at pp. 119, 121, 126, 161—

> The power of removal is an incident to the power to appoint, but such incident does not extend the Senate power to checking appointments, to removals.

The Illinois constitutional provisions are the same as the Federal constitutional provisions concerning power and separation of powers. Article V, Sec. 6, of the Illinois Constitution, is as follows:

> SEC. 6. The Supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.

and Article V, Sec. 10, as follows:

> SEC. 10. The governor shall nominate, and by and with the advice and consent of the Senate, (a majority of all the Senators elected concurring by yeas and nays), appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for; and no such officer shall be appointed or elected by the general assembly.

These sections are similar in import to Article II, Sections 1, 2 and 3 of the United States Constitution, providing for the executive department. As stated in Myers v. United States, supra, this Article prevents the Congress from passing legislation that would provide for removal or recall of an officer nominated by the President and confirmed by the Senate. Since Congress does not have this power as to officers appointed by the Chief Executive authority of the National Government, it certainly cannot be said that it has such authority to provide by legislation for the removal of a state officer appointed by the Governor of Illinois and confirmed by the Illinois State Senate. To say that Congress has this authority would be to say that it has the right to usurp State of Illinois sovereignty. This authority is lacking in the General Assembly of Illinois, and in the Illinois judicial department as pointed out above in the case of Wilcox v. People, 90 Ill. 186, 204.

In pursuance of its constitutional authority the General Assembly passed the "Civil Administrative Code" providing for Directors to run the various executive departments of State government. Section 12, Chapt. 127, I.R.S. 1959 provides that the officer nominated by the Governor to a directorship, shall be confirmed by the Illinois State Senate before his appointment becomes effective. The Director of Conservation is one of the offices authorized by the Illinois Constitution under the words, "which may be created by law", found in Article V, Section 10.

Examine Sec. 12a, Title V, Sec. 118k, U.S.C.A. of the Hatch Act, and one finds it is worded as follows:

> No *officer* • • • *of any state*, whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States, or by any Federal Agency shall use his official authority or influence for the purpose of interfering with an election or nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command or advise any such officer or employee, lend or contribute any part of his salary or compensation or anything else of value to

any party, committee, organization, agency or person for political purposes. No such *officer* • • • shall take any active part in political campaigns. For the purposes of the second sentence of this subsection, the term "officer" • • • shall not be construed to include (1) the Governor or Lieutenant Governor of any state, or any person who is authorized by law to act as Governor • • • (2) duly elected heads of executive departments of any State • • • (3) officers holding elective offices.

Now compare this Section dealing with State officers, with Sec. 13a, Title V, Sec. 118i, which provides as follows:

(a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof; no officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose, and to express their opinions on all political subjects and candidates. For the purposes of this Section, the term "officer" • • • shall not be construed to include (1) the President and Vice-President of the United States, (2) persons whose compensation is paid from the appropriation for the office of the President, (3) heads and assistant heads of executive departments, (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine polices to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal Laws.

It is apparent, after reading the two sections, that Congress exempts from the provisions of Sec. 13a, Title V, 118i, "(3) heads and assistant heads of executive departments: (4) officers who are appointed by the President, by and with

the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers, or in the nationwide administration of Federal Laws." To exclude this class of officers as set out in subdivisions (3) and (4) would clearly have made this section unconstitutional as a usurpation of executive power. Myers v. United States, 272 U.S. 52, and Humphrey's executor v. United States, 295 U.S. Reports, 602. Congress with these inclusive exemptions in Sec. 13a, 118i, recognizes that its authority is limited in this respect, yet it fails to give the same exemption to the appointed and Illinois State Senate confirmed heads of the executive departments of the State Government, and the appointed heads and assistant heads of executive departments of State of Illinois government. Can it not be reasonably and constitutionally said, that while the various acts providing funds as above set out are acts of cooperation between the States and Federal governments, that Congress, in its failure to exempt the heads of State executive departments, who also determine policy, has acted to treat Illinois as an agency of the Federal Government incapable of running its own internal affairs, rather than as an equal independent sovereign fully capable of determining the qualification of its executive officers free from interference of the United States, and also fully capable of providing for the recall of State officers under its own constitutional processes and duly enacted State laws free from interference by the United States?

Article IV, Sec. 4 of the United States Constitution, provides:

> The United States shall guarantee to every State in this Union a Republican form of government * * *

This provision has been fully considered in *South Carolina v. United States*, 199 U.S. 437, 454, 50 L. Ed. 261, 26 S. Ct. 110, where the Court said:

> Each state subject to the limitations prescribed by the Constitution, and within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that "the

United States shall guarantee to every State a Republican Form of Government", Article IV, Sec. 4. That expresses the full limit of national control over the internal affairs of a state.

Examine 12a, and 12f(1) in the light of this constitutional provision. Congress exerts power to exclude from the term "officer and employee" the Governor, Lieutenant Governor of any State, or any person who is authorized by law to act as Governor, and defines under 12f(1) the term "state or local agency" to mean the executive branch of any state, or of any municipality or other political subdivision of such State, or any agency or department thereof.

The Illinois Constiution as above pointed out makes the Governor the supreme executive authority of the State. Section 12f(1) defines the term "State" to mean "the executive branch of any State". It is clear that the Hatch Act, by congressional expression, is directed at the executive branch of state government. Unless there is an executive branch, state government could not exist. The source of power for the executive branch is Article V of the Illinois Constitution, and the authority for removal of a state officer comes from Section 12 thereof. Thus the Hatch Act is directed to telling the State of Illinois that unless Illinois removes the officer, Illinois will not be entitled to share in contracts of cooperation, unless she suffers the loss of twice the annual salary of the officer under contracts legitimately entered into in a spirit of cooperation, or Illinois, you must surrender the right of sovereignty to determine the qualification of a state officer if you expect to share in the contractual right of cooperation offered by the three federal acts here involved. Illinois undoubtedly has the constitutional right to lay down the rules for the qualifications of state officers in carrying on the internal affairs of State government, irrespective of what Congress may desire, and this power similarly rests in Congress under the Federal Constitution, in so far as the National Government is concerned.

Illinois, in fact, has provided under its own Political Activities Act that employees have the right to engage in

political activities. This Act is found under "Political Activity, Chapt. 24½, Vol. I, I.R.S. 1959, Sections 38s, 38t, 38u, and 38v, p. 998. This Act provides:

38s SECTION 1.—Application of Act. This Act shall apply to all employees of the State whose employment or tenure is subject to recognized merit principles of public employment.

38t SECTION 2.—Prohibited Political Activity. Any employee subject to this Act may be discharged in accordance with the discharge procedures controlling his position during regular working hours in any of the following Acts:

(a) Participating in the organization of any political meeting.

(b) Soliciting money from any person for any political purpose.

(c) Selling or distributing tickets for political meetings.

(d) Assisting at the polls in behalf of any party or party-designated candidate on election day.

(e) Using or threatening to use the influence or authority of his position to coerce or to persuade any person to follow any course of political action.

(f) Initiating or circulating any petitions on behalf of a candidate or in support of a political issue.

(g) Making contributions of money in behalf of a candidate or in support of a political issue.

(h) Distributing campaign literature or material in behalf of any candidate.

In respect to employees whose salaries are paid in whole or in part by federal funds, and whose employment is subject to Federal standards for a merit system of Personnel Administration applicable to grant in aid programs, the prohibited political activities enumerated in this Section may not be engaged in at any time, whether during or outside of regular working hours. Violation of this prohibition

by any such employee shall subject him to discharge in accordance with the procedures controlling his position. Nor shall this Act be deemed to authorize conduct prohibited by the Federal Hatch Act by employees subject to said Act.

38a. Membership not to affect employment. Contributions not to be a condition of employment. Section 3.

No employee hereunder shall be denied or deprived of employment solely because he is a member or officer of a political committee, of a political party, or of a political organization or club; nor shall he be required as a condition of his employment or tenure to work or make contributions in behalf of any political party or any candidate for political office.

38v. Prohibition against inducing employees to violate Act. Sec. 4. No person shall coerce, induce persuade or attempt to persuade any employee to violate any of the provisions of this Act.

This Act, in plain definite language, protects Federal funds from political waste or dissipation by employees or anyone attempting to persuade or coerce them. It was enacted by the General Assembly under its prerogative to pass laws. Thus Illinois in its cooperative spirit has done everything that Congressional cooperation provides for insofar as Congressional cooperation can require under Constitutional procedures insofar as its employees are concerned, and it prohibits anyone *including a State officer* by Section 38v or Section 4, from coercing, inducing, persuading or attempting to persuade any employee to violate any of its provisions.

In furtherance of carrying out the provisions of the Political Activities Act, Illinois has on its Statute books, a Personnel Code. Section 2 of this Act, Chapt. 127—State Government, Paragraph 63b 102, I.R.S. 1959, declares that its purpose "is to establish for the government of the State of Illinois a system of personnel administration under the Governor, based on merit principles and scientific methods." Paragraph 63b 104, Section 4 of the Act provides that "All offices and positions of employment in the service of the

State of Illinois shall be subject to the provisions of this Act unless specifically exempted in this Act." Section 4c, Paragraph 63b 104c provides under subdivision 7 for the exemption of "Directors of Departments".

Section 8, Paragraph 63b 108, Rules, provides that the Director of Personnel shall prepare and submit rules which shall have the force and effect of law, and that such rules "may provide" for such exemptions or modifications as may be necessary to *assure the continuity of federal contributions in those agencies supported in whole or in part by federal funds.*

Section 16, Paragraph 63b 116 provides that all officers and employees of the State shall comply with and aid in all proper ways in carrying out the provisions of this law, and the rules, regulations and orders thereunder, and Section 16, Paragraph 63b 118 provides the penalties.

> (1) Any person who wilfully violates any of the provisions of this Act, or of the rules, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not less than $50 nor more than $500, or by imprisonment for a period not to exceed six months, or by both such fine and imprisonment. Each violation shall constitute a separate and distinct offense.
>
> (2) Any person who is convicted of a misdemeanor under this Act shall, for a period of five years, be ineligible for appointment to or employment in a position of the State service.

All the provisions of this Act protect State employees who are under this Act from political coercion. The Act provides a comprehensive system for State merit service in accordance with Federal standards of merit employment and the Illinois Political Activities Act in conjunction therewith provides for complete compliance with the Act and Federal Acts under which State-Federal Cooperative programs are carried out. All these State Acts were passed by the Illinois General Assembly under its prerogative to pass State laws as provided in Article IV of the State Constitution. They express the will of Illinois under its prerogatives of

government. The Personnel Code specifically exempts a "Director" of a State Department from the provisions thereof, as far as his office is concerned, yet it requires the individual holding the office to comply with its terms when it comes to employee personnel in the office under penalties of a misdemeanor as set out above.

When the provisions of the Section 12(a) were before the Senate of the United States for passage, the bill as first presented, included a provision as follows:

> Officers who are appointed by the Governor of any State by and with the advice and consent of the legislature or either house thereof, and who determine policies to be pursued by such state in the state-wide administration of State laws.

This was quite similar to the provision applicable to the officers of the Federal government as above pointed out. When this provision was about to be stricken, the following colloquy took place:

> Mr. CLARKE of Missouri. Mr. President, I offer this amendment because I do not believe there is any rhyme or reason in excepting such employees from the operation of the law simply because they happen to be appointed by the Governor and confirmed by the legislature. * * *
>
> Mr. MINTON. Mr. President, will the Senator yield?
>
> Mr. CLARKE of Missouri. I yield to the Senator from Indiana.
>
> Mr. MINTON. Does the Senator see any reason why anybody should be excepted? Why should we except the Governor?
>
> Mr. CLARKE of Missouri. The Governor has been elected by the people of the State, and I can see a reason for exempting him. I can also see a reason for the *second* exception, "elective heads of executive departments of any State * * *." That is an entirely different thing from allowing a State machine to be built up by the persons included in exception 3, who are usu-

ally the main cogs in every State machine. To say that a man who is elected by the people of a State shall have a right to appeal to the people of a State whenever he sees fit is one thing. To say that other officials appointed by the Governor or members of the State machine shall be permitted improperly to use federal funds for the purpose of perpetuating that machine is an entirely different thing.

Mr. MINTON. Mr. President——

Mr. CLARKE of Missouri. I again yield to the Senator from Indiana.

Mr. MINTON. Then, as I understand, it is the Senator's position that he wants to strike out this provision because these people are not elected by the people.

Mr. CLARKE of Missouri. I say there is an essential difference between those who are elected by the people, and those who are appointed • • •

Mr. MINTON. In my State, the State highway commissioners are not elected. They are appointed. They are not confirmed by the Senate. They do not have to be confirmed in my State. Do they have to be confirmed in the State of Missouri?

Mr. CLARKE of Missouri. It so happens that they do have to be confirmed in my State, but it seems to me to make no difference whether they have to be confirmed or not, because, in my opinion, there is no basis for a distinction.

This colloquy shows that the only discussion when the amendment striking exception 3 was before the Senate, that Mr. Clarke had in mind the political evil of wasting funds through political activities, and the coercion of individual state employees by state officers. As pointed out above, Illinois has strict laws prohibiting such activities and such coercion. While the Senate denied the right to a State to permit political activity on the State level, it saw fit to grant the right on the National level. While this discussion was taking place, no constitutional lawyer in the Senate stood

up to remind Mr. Clarke of Section 4 of Article IV of the Constitution:

> SEC. 4. The United States shall guarantee to every State in the Union a Republican form of Government • • •

nor did any one tell him that this defined the limits of the United States in so far as its dealings with the States was concerned, nor did any one call to his attention or to the attention of the Senate the decision of the Supreme Court in the case of *Cummings* v. *Missouri, supra*, which said, speaking of his own State of Missouri:

> But, as it was observed by the learned counsel who appeared on behalf of the State of Missouri, this Court cannot decide the case upon the justice or hardship of these provisions. Its duty is to determine whether they are in conflict with the Constitution of the United States • • • We admit the propostions of the counsel of Missouri, that the states which existed previous to the adoption of the Federal Constitution possessed originally all the attributes of sovereignty, and they still retain those attributes, except as they have been surrendered by the formation of the Constitution and the Amendments thereto; that the new states, upon their admission to the Union, became invested with equal rights, and were thereafter subject only to similar restrictions, and that among the rights reserved to the States is the right of each state to determine the *qualification for office*, and the conditions upon which its citizens may exercise their various callings and pursuits within its jurisdiction • • •
>
> Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession. Webster defines the term to mean "any natural endowment or any acquirement which fits a person for a place, *office*, or employment, or enables him to sustain any character with success." It is evident from the nature of the pursuits and professions of the parties placed under disabilities by the Constitution of Missouri, that many

of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursits and professions • • •

The learned counsel does not use these terms, "life, liberty and property" as comprehending every right known to the law. He does not include under liberty, freedom from outrage of the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment; the circumstances attending, and the causes of the deprivation determining this fact. Disqualifications from office may be punishment, as in cases of convictions on impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor • • • may also and often has been imposed as punishment • • •

"Some punishment", says Blackstone, "consists in exile or banishment • • • others include a disability of holding offices or employments and the like." 4 Bl. 377 • • •

nor did any one call to his attention *Butler* v. *United States*, 296 U.S. 68, 56 S. Ct. 312, 320,

It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the execution of powers which are granted • • • The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power, to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.

"Congress is not empowered to tax for those purposes which are within the exclusive power of the States". *Gibbons* v. *Ogden*, 9 Wheat 1, 6 L. Ed. 23.

> There are indeed, certain virtual limitations arising from the Constitution itself. It would undoubtedly be an abuse of the (taxing) power if so exercised as to *impair the separate existence and independent self-government of the States*, or if exercised for ends inconsistent with the limited grants of power in the Constitution." *Veazie Bank* v. *Fenno*, 8 *Wall.* 533, 541; 19 L. Ed. 482.

Nor did any one call to his attention that his own State, Missouri, was a sovereignty complete within its own jurisdiction; nor did any one remind him or call to his attention that the Constitution of Missouri, whereby the people of Missouri organized a State government, was the supreme law of Missouri, or that it was the source of power within the limits of its borders that created three separate departments of state government free from the interferences of the United States in matters concerning its own internal affairs all guaranteed by Article IV, Sec. 4 of the United States Constitution nor did any one call to his attention the decisions of the United States Supreme Court in the cases of *McCullough* v. *Maryland*, 4 Wheat. 316, 430 (1819); *Texas* v. *White*, 7 Wall. 700, 725 (1868); *Lane Co.* v. *Oregon*, 7 Wall. 71, (1868); *Collector* v. *Day*, 11 Wall. 113, 125, 126 (1870); *United States* v. *Railroad Co.*; 17 Wall. 322, 329 (1872); *Pollack* v. *Farmers Loan & Trust Co.*, 157 U.S. 429, 586 (1895); *South Carolina* v. *United States*, 199 U.S. 437, 454; 50 L. Ed. 261, 267 (1905); *Farmers & Mechanics Bank* v. *Minnesota*, 232 U.S. 516, 526 (1914); *Indian Motorcycle Co.* v. *United States*, 283 U.S. 570, 575, et seq. (1931); *United States* v. *Constantine*, 296 U.S. 287 (1935); and *U.S.* v. *Butler*, 297 U.S. 1 (1936).

This brings us to the crux of the question as to whether or not the Congress can require the General Assembly of Illinois to pass a law requiring qualifications for a State office when it wills otherwise, or further stated, does Congress have the power to withhold funds to force such a qualification under its own power, when Illinois has already spent the contracted funds in derogration of its own revenue. It

is only the Hatch Act, not Pittman-Robertson, Dingell-Johnson, or Clarke-McNary Acts, that so provide for the political position in question. The answer of the Civil Service Commission is that the Oklahoma case so decides.

The factual situation in the Oklahoma case did not involve the question of contracts legally entered into, or the withholding of funds on completed contracts, provided the State officer was not discharged in 30 days as the Commission must under the Hatch Act so certify to the Federal Agency, which is then required to withhold from the State of Illinois, funds equivalent to two years' annual salary, $24,000 as above pointed out.

In Oklahoma, the Court says: "While the United States is not concerned and has no power to regulate local political activities as such of State officials, it does have power to fix the terms upon which its money allotments to States shall be disbursed." There is no citation of Constitutional authority to this proposition. The statement, "it does have power to fix the terms upon which its money allotments to States shall be disbursed", is not tested to inquire the extent of the power. There is no question that Congress has the power to levy the tax and to make the appropriations, as provided by the three acts in question, Dingell-Johnson, Pittman-Robertson and Clarke-McNary, nor is there any doubt that Congress has the power to watch over the funds, all as provided under these three acts and the rules enacted thereunder, all of which have been complied with as the record herein shows. The question is whether or not there is a constitutional limitation that prevents Congress from enacting the Hatch Act sections in question. Undoubtedly there is power in Congress to pass the Act as to federal employees, and to certain federal officials, and this power comes from Congressional prerogatives to pass laws for the running of the Federal government, all as granted under Article 1, Sec. 1, of the Federal Constitution. However, this power is qualified by the provision of the Federal Constitution requiring the United States to guarantee to each State a Republican form of government.

The question is whether or not there is a reasonable constitutional limitation that prevents Congress from enacting a law, in this instance Sec. 12 etc. of the Hatch Act concerning State officers, to the extent that it can indirectly control the hiring or firing, and the appointment, recalling or discharging of a State officer contrary to the provisions of Illinois law, duly enacted by the Illinois General Assembly under its State constitutional authority. The court in Oklahoma says, "The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. As pointed out in United States v. Darby, 312 U.S. 100, 124, 657; 61 S. Ct. 451, 462, 85 L. Ed. 609, 132 A.L.R. 1430, the Tenth Amendment has been consistently construed, 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.' The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for political needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the State, it has never been thought that such effect made the federal act invalid."

To this proposition the court cites *Veazie Bank* v. *Fenno*, 8 Wall. 533, 547, 19 L. Ed. 482; *Stearns* v. *State of Minnesota*, 179 U.S. 223; 21 S. Ct. 73, 81; 45 L. Ed. 162; *State of Florida* v. *Mellon*, 273 U.S. 12; 47 S. Ct. 265, 71 L. Ed. 511; *Helvering* v. *Therrell*, 303 U.S. 218; 58 S. Ct. 539; 82 L. Ed. 758; *Wright* v. *Union Central Life Ins. Co.*, 304 U.S. 502, 516; 58 S. Ct. 1025, 1033; 82 L. Ed. 1490, and *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 338; 56 S. Ct. 466, 479, 80 L. Ed. 688.

In *United States* v. *Darby*, *supra*, the Constitutional power was found to exist under the Commerce clause of the Constitution, and it was from this source that the power was exerted. In Veazie Bank v. Fenno, supra, the power to levy the tax was found to exist under the Taxing Clause. The corporation against which the tax was levied was a private state banking corporation, incorporated under State

law, and the tax was levied against a state bank note. The certain activity within the State was not the State itself, or any political subdivision thereof. In Stearns v. State Bank of Minnesota, the basis was found under the Contract Impairment Clause of the Constitution and the Clause authorizing the United States to dispose of its property. The corporation involved was a private railroad corporation. In this case the court points out, speaking of constitutional power,

> There are, indeed, certain virtual limitations arising from the principles of the Constitution itself. It would, undoubtedly, be an abuse of the power if so exercised as to impair the separate existence and independent self government, (County of Lane v. Oregon) of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution (19 L. Ed. 482, 485; 75 U.S. 533, 541).

In this case the Court further said,

> That these provisions of the enabling Act and the Constitution, in form at least, made a compact between the United States and the State is evident. In an inquiry as to the validity of such a contract, this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two states, or between the state or the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to validity of these two kinds of compacts or agreements, is obvious. It has often been said that a state admitted into the Union enters therein with full equality with all others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations (45 L. Ed. 162, 174, 179 U.S. 223, 24).

In *Florida* v. *Mellon*, the court refused to take jurisdiction on the ground that the Federal Estate Tax Act was uniform and constitutional under the Taxing Clause of the Federal

Constitution. The power to act in *Wright* v. *Union Central Life Insurance Co.* was found to exist under the Bankruptcy Clause. In *Ashwander* v. *Tennessee Valley Authority*, the power to act was found to exist under the War and Commerce Clause, and under the disposition of property clause. Under each of these decisions constitutional power existed under a specific clause of the Constitution. In this latter case the Court reiterated the propostion announced in *McCulloch* v. *Maryland*:

> That Congress may not, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government (4 Wheat. 316, 423, 4 L. Ed. 579).

In Oklahoma, the court further said, "A hearing was had, conformable to Section 12, and the conclusion was reached that Mr. Paris' active participation in politics justifies his removal from membership on the Highway Commission. Oklahoma chose not to remove him. We do not see any violation of the State's sovereignty in the hearing or order. Oklahoma adopted the 'simple expedient' of not yielding to what she urges is federal coercion. Compare *Commonwealth of Massachusetts* v. *Mellon*, 262 U.S. 447, 482, 43 S. Ct. 597, 599, 67 L. Ed. 1078." This last cited case was an attempt on the part of Massachusetts in which the state sought to enjoin the spending of federal moneys appropriated under the Maternity Act. The basis for disposing of the questions raised was that the two cases involved must be dismissed for want of jurisdiction, without considering the merits of the constitutional question on the grounds that no justiciable controversy was presented by Massachusetts, and that Frothingham had no such interest in the subject matter, nor was any such injury inflicted or threatened, as enabled her to sue. The court pointed out the jurisdictional line of demarcation. This is particularly pointed out in *United States* v. *Butler*, 297 U.S. 1, 57; 56 S. Ct. 312, 315, 316, where the court said,

> *Massachusetts* v. *Mellon*, 262 U.S. 447, is claimed to foreclose litigation by the respondents or other tax-

payers, as such, looking to restraint of the expenditure of government funds. That case might be an authority in the petitioners' favor if we were here concerned merely with a suit by a taxpayer to restrain the expenditure of the public moneys. It was there held that a taxpayer of the United States may not question expenditures from its treasury on the ground that the alleged unlawful diversion will deplete the public funds and thus increase the burden of furture taxation. Obviously the asserted interest of a taxpayer in the federal government's funds and the supposed increase of the future burden of taxation is minute and indeterminable. But here the respondents who are called upon to pay moneys as taxes, resist the exaction as a step in an unauthorized plan. This circumstance clearly distinguishes the case • • •

Here the State and the State officer, as pointed out in *Oklahoma* v. *U.S. Civil Service Commission,* have the interest to raise the question. The statement is made concerning the simple expedient of not yielding. In the instant case, Illinois has yielded within the limits of her full constitutional power by complying with every standard laid down by the three acts in question. One can see from reading the opinion that the power to enact the act and make the expenditure was given by the taxing power of the Constitution, in *Massachusetts* v. *Mellon, supra.* In *Steward Machine Co.* v. *Davis,* the State of Alabama had complied with the terms of the Social Security Act, just as Illinois in the instant case has complied with the provisions of the three acts here involved. The court, in holding that a tax could be levied, found the power to levy the tax under the taxing clause of the Constitution. Specifically the court held as follows:

First the tax, which is described in the Statute as an excise, is laid with uniformity throughout the United States as a duty, an impost, or an excise upon the relation of unemployment (57 S. Ct. 883, 887; 301 U.S. 548, 578).

Second, the tax is not invalid under the provisions of the Fifth Amendment by force of its exemptions (57 S. Ct. 883, 889; 301 U.S. 548, 583).

Third, the excise is not void as involving the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government (57 S. Ct. 883, 890; 301 U.S. 548, 585).

Fourth, the statute does not call for a surrender by the states of powers essential to their quasi sovereign existence (57 S. Ct. 883, 893; 301 U.S. 548, 593).

No such questions are raised in the instant case. In fact, Illinois has joined with Congress under the respective acts of cooperation as above pointed out. It is pertinent to point out here that the court said, concerning acts of cooperation:

The inference of abdication thus dissolves in the thinnest air when the deposit is conceived of as dependent upon a statutory consent, and not effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogation from their sovereignty. * * * The states are at liberty, upon obtaining the consent of Congress, "to make agreements with one another * * *" We find no room for doubt that they may do the like with Congress if *the essence of their statehood is maintained without impairment* (57 S. Ct. 883, 895; 301 U.S. 548, 597).

As above pointed out the Hatch Act strikes at disqualification of a state officer, appointed by the Governor and confirmed by the Illinois State Senate, with no power under Illinois law to disqualify the state officer for the reason assigned in the Hatch Act.

In *United* v. *Bekins*, 304 U.S. 27, 58 S. Ct. 811, the power exerted existed under the Bankruptcy Clause of the Constitution. The State consented that individual taxing bodies could file a petition in bankruptcy. The court said:

Third, We are thus brought to the inquiry whether the exercise of the federal bankruptcy power in dealing

with a composition of debts of the irrigation district, upon its voluntary application and with the State's consent, must be deemed to be an unconstitutional interference with the essential independence of the State as preserved by the Constitution.

In *Ashton* v. *Cameron County District*, *supra*, the court considered the provisions of Chapter 9, 11 U.S.C.A., Sec. 301, et seq., authorizing the bankruptcy court to entertain proceedings for the "readjustment of the debts", of "political subdivisions" of a State "might materially restrict its control over its fiscal affairs", and was therefore invalid: that if obligations of states or their political subdivisions might be subjected to the interference contemplated by Chapter IX, they would no longer be free to manage their own affairs.

In enacting Chapter 10 the Congress was especially solicitous to afford no ground for this objection. In the report of the Committee on the Judiciary of the House of Representatives, which was adopted by the Senate Committee on the Judiciary, in dealing with the bill proposing to enact Chapter 10, the subject was carefully considered. The committee said:

"Compositions are approvaable only when the districts or agencies file voluntary proceedings in courts of bankruptcy, accompanied by plans approved by 51 percent of all the creditors of the district or agency, and by evidence of good faith. Each proceeding is subject to ample notice to creditors, thorough hearings, complete investigations, and appeals from interlocutory and final decree. The plan of composition cannot be confirmed unless accepted in writing by creditors holding at least 66⅔ per cent of the aggregate amount of the indebtedness of the petitioning district, or taxing agency, and unless the judge is satisfied that the taxing district is authorized by law to carry out the plan, and until a specific finding by the court that the plan of composition is fair, equitable and for the best interests of the creditors * * *.

"The Committee of the Judiciary is not unmindful of the sweeping character of the holding of the Supreme Court above referred to in the Ashton case, and believes that H.R. 5969 is not invalid or contrary to the reasoning of the majority opinion * * *

"The bill here recommended for passage expressly avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties. No interference with the fiscal or governmental affairs of a political subdivision is permitted. The taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation. No involuntary proceedings are allowable, and no control or jurisdiction over that property and those revenues of the petitioning agency necessary for essential governmental purposes is conferred by the bill * * *

"There is no hope for relief through statutes enacted by the States, because the Constitution forbids the passing of State laws impairing the obligations of contracts. herefore relief must come from Congress, it at all. * * *

"It is the opinion of the committee that the present bill removes the objections to the unconstitutional statute, and gives a forum to enable those distressed taxing agencies which desire to adjust their obligations and which are capable of reorganization, to meet their creditors under necessary judicial control and guidance and free from coercion, and to affect such adjustment on a plan to be mutually advantageous."

We are of the opinion that the Committees's points are well taken and that Chapter 10 is a valid enactment. The statute is carefully drawn so as not to impinge upon the sovereignity of the State. The State retains control of its fiscal affairs. The bankruptcy power is exercised in relation to a matter normally within its province and only in a case where the action of the taxing agency in carrying out a plan of

composition approved by the bankruptcy court is authorized by state law. It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power (58 S. Ct. 811, 814; 304 U.S. 27, 49).

Thus the rule announced in *Ashton* v. *Cameron County District*, 298 U.S. 513, 56 S. Ct. 892, 896, 80 L. Ed. 1309, is the law on questions that affect state sovereignty concerning the power of the United States as granted in the Constitution, or that a source of power must be found therein to permit congressional action, the Court said:

> The pertinent doctrine now firmly established was stated through Mr. Chief Justice Chase in *Texas* v. *White*, 7 Wall. 700, 725, 19 L. Ed. 227:
>
> "We have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence;' and that 'without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said, that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."
>
> *Collector* v. *Day*, 11 Wall. 113, 125, 126, 20 L. Ed. 122:
>
> "Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary

consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

In *Indian Motorcycle Co.* v. *United States*, 283 U.S. 570, 575, et seq., relevant cases are collected and the following conclusion announced—

"This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system."

Notwithstanding the broad grant of power "to lay and collect taxes," opinions here plainly show that Congress could not levy any tax on the bonds issued by the respondent or upon income derived therefrom. So to do would be an unwarranted interference with fiscal matters of the State—essentials to her existence. Many opinions explain and support this view • • •

The power "To establish • • • uniform Laws on the subject of Bankruptcies" can have no higher rank or importance in our scheme of government than the power "to lay and collect taxes." Both are granted by the same section of the Constitution, and we find no reason for saying that one is impliedly limited by the

necessity of preserving independence of the States, while the other it not * * *.

Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted. United States v. Butler, 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914, decided January 6, 1936. The sovereignty of the State essential to its proper functioning under the Federal Constitution cannot be surrendered; it cannot be taken away by any form of legislation. See *United States* v. *Constantine*, 296 U.S. 287, 56 S. Ct. 223, 80 L. Ed. 233 * * *.

The difficulties arising out of our dual system of government and the opportunities for differing opinions concerning relative rights of state and national government are many; but for a very long time this court has steadfastly adhered to the doctrine that the *taxing power of Congress does not extend to the states or their political subdivisions.* The same basic reasoning which leads to that conclusion, we think, requires like limitation upon the power which springs from the bankruptcy clause. *United States* v. *Butler, supra.*

It is to be noted also that the tax provided under the Pittman-Robertson Act, and under the Dingell-Johnson Act are not, strictly speaking, a tax or duty within the meaning of the Constitution. See Sections 669(b), 669(b)(1), 669(c), 777(b), Title 16, U.S.C.A. Under Section 669(b) an amount equal to the revenue accruing * * * on firearms, shells and cartridges, Section 4181, Title 26, U.S.C.A., is authorized to be set apart in the Treasury as a special fund to be known as "Federal aid to wildlife—restoration fund" to be used under Section 669 in accordance with cooperation agreements and under Section 777, "there is authorized to be appropriated an amount equal to the revenue accruing from tax imposed by Section 3406 (4161) of Title 26 on fishing, rods, creels, reels, and artificial lures, baits and flies," to be used under Section 777 in accordance with cooperation agreements with the states. The money thus raised, though paid into the Treasury, is appropriated in advance to the

uses of these statutes, and does not go to the general support of the Federal Government. *Edye* v. *Robertson* 112 U.S. 580, 28 L. Ed. 798, 803, 5 S. Ct. 247, *United States* v. *Butler*, 297 U.S. 1, 60, 56 S. Ct. 312, 316. The theory of these acts is to afford to the states aid in the various projects within the internal borders of the states, enumerated by these statutes as in this record shown. The sections of the Hatch Act in question seemed to be directed to the end, under the guise of federal appropriation and spending, of attempting to regulate matters wholly within and instrumentalities and officers of the State of Illinois that are necessary to running the Department of Conservation, which is in fact the State of Illinois.

It is plain then that the power asserted in Oklahoma did not spring from the taxing clause. The power of the Congress to pass the Hatch Act, applied to federal employees, springs from the reasonably implied power to regulate and pass laws for the running and perpetuation of the Federal Government. Likewise this same power exists in the State government, and in the exercise of these powers, neither can impose its will on the other, by law or otherwise. Thus inquiry having been fully made, there can be found no authority or power conferred in the Constitution that authorizes the application of the Hatch Act to state officers, nor can there be found any constitutional authority that permits Congress to withhold money due under contracts of cooperation entered into under permission of laws mutually enacted for the benefit of the other. It is further the law that what one state cannot do directly, cannof be done indirectly in so far as the internal affairs of the individual state are concerned without its consent, which Illinois by its legislative body has not given. The Department of Conservation is roughly comparable to the Department of the Interior. Both are essential departments of the respective state and national governments. Both must be supported by taxation raised through the respective taxing powers of both governments and to say that the Congress can provide a qualification for a state officer contrary to the specific provisions of the Constitution and laws of Illinois under the

law and facts as herein set out would amount to destruction of principles of constitutional government as we have known it from the time of the creation of the Constitution, thereby reducing Illinois to a mere geographical division of the Federal government. The Congress has never been permitted, by the Supreme Court, to pass laws that have no foundation in constitutional powers, which are not either expressly granted or reasonably implied from the powers expressly granted.

It is true that a state may consent to a surrender of constitutional power. This is known as the doctrine of consent. The consent must come from the power of the legislative department of state government having the right to give the consent, as, for example, consent to surrender a fiscal power such as was done in the case of *United States* v. *Beakins, supra.* There the legislature of California had the power to deal with fiscal affairs of the taxing body. This is also permitted under acts of cooperation because the State legislative body has the power to deal with the surrender of legislative power. The legislative body also has the right to control state employees because they come within the right, as likewise the qualifications of state officers where the Constitution of Illinois has not so provided. There has been no consent here. The doctrine of waiver of the constitutional rights and prerogatives has never been applied to the sovereignty of a state. In fact, in the absence of consent, the rule is otherwise. This rule of constitutional law is announced in 11 Am. Jur., Sec. 170. p. 864, as follows:

> The original thirteen states existed prior to the adoption of the Federal Constitution and before that time possessed all the attributes of sovereignty. All these attributes except those surrendered by the formation of the Constitution, and the Amendments thereto, have been retained. New states, upon their admission into the Union, became invested with equal rights and are subject only to such restrictions as are imposed on the States already admitted. There can be no state of the Union whose sovereignty or freedom of action is in any respect different from that of any other state.

> There can be no restriction on any state other than one prescribed upon all the states by the Federal Constitution. Congress, in admitting a state, cannot restrict such state by bargain. The state by so contracting with Congress is in no wise bound by such a contract however irrevocable it is stated to be. It is said that subject to the restraint and limitations of the Federal Constitution, the states have all the sovereign powers of independent nations over all persons and things within their respective territorial limits.

It is pertinent, as to the existence of any such power, to point out what the court said in one of these last cited cases, *Collector* v. *Day*, 11 Wall. 113, 125, 126:

> Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, that without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not necessary consequence, that the *means and instrumentalities employed for carrying on the operations of their government* for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits, but the will of the legislative body imposing the tax. And more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department *and the appointment of officers to administer their laws. Without this power*, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence.

It is also pertinent here to take note of the fact that Mr. Clarke had this to say:

> I do not believe there is any rhyme or reason in excepting such *employees* from the operation of the law,

and in response to Mr. Minton's question:

> Does the Senator see any reason *why anybody should be excepted?* Why should we *except the Governor?*

Mr. Clarke had this to say:

> The Governor has been elected by the people of the State, and I can see a reason for exempting him. I can also see a reason for the second excepti (elected heads of any executive departments of any state) • • • To say that a man who is elected by the people of a State shall have a right to appeal to the people of a State whenever he sees fit is one thing. To say that other officials appointed by the Governor • • • is an entirely different thing,

and further,

> I say there is an essential difference between those who are elected by the people, and those who are appointed • • •,

and further,

> • • • it seems to me to make no difference whether they have to be confirmed or not, because, in my opinion, there is no basis for a distinction.

It is apparent from what Mr. Clarke said that he (1) regarded a state senate confirmed officer the same as an employee, (2) that state and federal constitutional questions never entered into the discussion, (3) that even the Governor of a State was subject to Congressional action in regard to the matter under consideration, and (4) that it was felt "that no limits" governed the enactment, "but the will of the legislative body." As to Point 1, the Constitution of Illinois provides the distinction under Article V, Section 24, I.R.S. 1959, p. 15, when it says:

> An office is a public position created by the Constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished.

Thus as to this point there is a distinction, and the distinction covers both, whether elected or appointed officers, as being State officers and employees. Thus under the Constitution of Illinois there should have been a distinction, but the Illinois Constitution was never considered when the Act in question was before the Senate. As to 2, it has previously been pointed out that the Governor of Illinois, in his office, is the supreme executive power of Illinois, as the President is the supreme executive power of the United States, and as Illinois in its own internal affairs is a sovereign state, free from the trammel or duress of any one, even the Congress, as is the National government in the exercise of its powers, the same rule of law governs both in the dealings with each other, as the Supreme Court of the United States, has on numerous occasions so decided as herein pointed out, and that the acts of the executive officers appointed by the Governor are in effect the acts of the Governor, just the same as the acts of the executive officers under the executive power of th United States, the acts of the President.

This has definitely been decided by the Supreme Court in *Marbury* v. *Madison*, 2 L. Ed. 60, 70; 1 Cranch 137, 166.

The Court in this case further said, p. 164:

> By the Constitution of the United States, the President is invested with certain political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers who act by his authority and in conformity with his orders.
>
> In such cases their acts the his acts, and whatever opinion may be entertained of the manner in which

executive discretion may be used, still there exists and can exist no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive is conclusive. The application of this remark will be perceived by advertising to the Act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that Act, is to conform precisely by the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examined by the courts.

Use all the above language, but in lieu of the words "President", and "Secretary of State", insert the words "Governor" and "Director of Conservation", and one can only reach the conclusion that the Director of Conservation in all his political acts, is the Governor or the agent for the Governor acting for him, and in his capacity he is subject to no authority but that of the Governor. If Illinois is to exist as a free and independent State in the exercise of its internal affairs, it must have a governor, and to say that Congress has the right to provide laws for his removal or suspension in the conduct of the legal internal affairs of Illinois is to say that Illinois is no longer a free and independent State. I believe that when Congress passed the Illinois Admission Act, approved Dec. 3, 1818, 3 U.S. Statutes at Large, 536, when it said;

> Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled * * * the people of said territory did, on the 26th day of August in the present year by a convention called for that purpose form for themselves a constitution and State government which constitution and state government so formed, is Republican, and in conformity to the principles of the articles of compact between the original states and the people and states in the territory northwest and the people and states in the territory northwest of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty-

> seven: Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, That the State of Illinois shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the orjginal states in all respects whatever,

it meant to create Illinois an independent state with all others, and that when this occurred the only power left in Congress concerning the regulation of its own internal political affairs ceased under Article IV, Section 4 of the United States Constitution, and that the Act of Admission, approving the Illinois Constitution and granting statehood, placed the Illinois Constitution beyond the powers of Congress to alter or strike down the Constitution and republican form of government found to exist by the passage of the Act in so far as the internal political affairs of Illinois are concerned, and that the purpose of Section 12(a) of the Hatch Act is to either directly or indirectly accomplish this purpose because when by its specific terms it points to the executive department of state government authorized to determine policies of State government by Illinois Constitution and laws, it attempts to determine the internal political affairs of Illinois, those which can only be determined by the Governor, who is answerable only to his State, and to his own conscience. It strikes one making an intense study of what has been said about the powers of the State and Federal governments, that no person, the President, the Congress, the Judiciary, the Governor or the State Legislatures can destroy the State government or pass any law that strikes at an executive department or either the State or National governments. Historically a civil war was endured to preserve the Union and the State governments, and Mr. Justice Marshall said, concerning the integrity of State government in *McCulloch* v. *Maryland*, 4 L. Ed. 579, 600, 4 Wheat. 316, 403,

> No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass.

It appears that if Congress can directly or indirectly prescribe or attempt to prescribe the qualifications of a state officer, or attempt to exert power directly or indirectly against an executive officer in charge of an executive brance of state government, or attempt to strike at penalizing state funds raised through State revenues, as this record shows, that then the prophetic statement which Marshall believed to be untrue, has come true, and Congress has the power to make the States mere geographical divisions of the National government. Thus it can readily be seen that the Hatch Act, when it points to the executive departments under the Governor, it strikes at the supreme executive authority of Illinois, and this it cannot do any more than it could strike at the supreme executive authority of the United States, the Presidency; and as to points 3 and 4 which also come under and are fully elaborated under point 2, the executive power of the State is thus subjected to the will of the Congress subject to no limits except the will of the legislative body. The Congress is not a parliament of the people. It is a separate brancl of the Federal government, and it secures its power from only one source, the Constitution of the United States.

Examine the question in the light of cooperation as contemplated under the various acts here in question. The three acts here involved are framed on the theory that the states may follow the plan of cooperation by adopting state legislation enabling the states to cooperate. The Hatch Act is framed on the theory that it is within the power of Congress, not only to permit cooperation, but to tell the states that unless they cooperate in accordance with the legislative will, which, without constitutional limitations knows no end, that they cannot participate in the enjoyment of cooperative action. Now, for example, if the state does not follow this will, yet enters into acts of cooperation, the State can either recall the state officer or suffer the loss of twice the annual salary of the officer after state money raised through its taxing power has already been spent with consent of the state legislature when it made the appropriation. If this power exists what is there to prevent a future Congress from say-

ing that the withholding of funds shall be fifty, or a hundred times the estate officer's salary? If the power exists Congress would have the right to so do. The closest most analogous case to be found denies this right. It is the case of *Lane County* v. *Oregon*, 74 U.S. 101, 7 Wall. 71, 19 L. Ed. 101, 104, where the Supreme Court, speaking of taxing power, said:

> Now to the existence of the states themselves, necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. It was exercised by the Colonies; and when the Colonies became states; both before and after the formation of the Confederation, it was exercised by the new governments • • • The Constitution it is true, greatly changed this condition of things. It gave the power to tax both directly and indirectly, to the National Government, and subject to the one prohibition of any tax upon exports and the condition of uniformity in respect to indirect, and of proportion in respect to direct taxes, the power was given without any express reservation • • • In respect, however, to property, business and persons within their respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the Supreme authority must be preferred, but with this qualification, it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised are all equally within the discretion of the Legislatures to which the States commit the exercise of the power. This discretion is controlled by the will of the people expressed in the State Constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National government. There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by National legislation. To the

extent just indicated, it is as complete in the States as the like power within the limits of the Constitution is complete in Congress.

Place this proposition against the Constitution of Illinois and consider that the Federal Agency is required to withhold from the State of Illinois, the sum of $24,000. First, the Constitution, Article IV, Section 17, provides: "No money shall be drawn from the Treasury except in pursuance of an appropriation made by law"; this is the Illinois constitutional authority under which money from the Illinois Treasury was appropriated for use under the three federal acts above mentioned. Second, the same Article provides, "and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution. The auditor shall * * * prepare and publish a full statement of all moneys expended at such session, specifying the amount of each item and to whom and for what paid", and this is the Illinois Constitutional provision that authorized the spending of State of Illinois moneys under the projects for which the money was spent under the cooperation provisions of the three Federal Acts. It was contemplated under the respective laws of the State and National governments that a portion of the money would be repaid into the State Treasury, and as the record in this case shows a sum approximating a portion equal to 6.3 per cent. Now if $24,000 is withheld from the State, the State Treasury will end short that amount for the constitutional provision provides, "and no money shall be diverted from any appropiation made for any purpose, or taken from any fund whatever, either by joint or separate resolution." Thus, the effect of the Hatch Act as sought to be applied in this case is to strike at a fund of Illinois levied and collected under Illinois Revenue laws from Illinois citizens and spend as provided by appropriation laws of Illinois, contrary to this constitutional provision. In the case of *Boeing Aircraft Corp.* v. *Reconstruction Finance Corp.*, 25 Wash (2d) 652, 171 P. 2d 838, 168 A.L.R. 539, 543 and 544, appeal dismissed 330 U.S. 803, 91 L. Ed. 1262, 67 S. Ct. 972, the Supreme Court of Washington, the Court said:

"In appellants brief we find the following:

"'It is unthinkable that, under a system of government such as we have in the United States, a state may, by its laws or constitutional provisions, defeat the clearly expressed policies of Congress. The Supremacy Clause was intended to prevent such a result.'

"We cannot so hold, for to do so would effectively do away with the provisions of our state constitution by subjecting those provisions to be continually changed by Acts of Congress. The Constitution of the United States has not given that power to Congress, and Congress has only the powers expressly given it by the Constitution of the United States. The American system of government is dual in nature, containing Federal and State sovereignities, each supreme in its appropriate sphere. The States do not get their power from the Federal government, but from the Constitution of the United States. They exercise those powers independently of the Congress of the United States. The Federal government has no power to control the power or authority of the State except as such power may have been expressly granted, or as may be necessary to maintain the acknowledged powers of the Federal government. True, Congress may determine the circumstances under which a state may be admitted into the Union, but that does not give it any powers to change or modify the provisions of the State Constitution.".

If this power to alter or change the plain meaning of a State Constitution existed in the Congress, then Congress could at will prevent a State from discharging its ordinary functions of government. Educational Films Corp. v. Ward, 282 U.S. 379, 391, 75 L. Ed. 400, 51 S. Ct. 170, 173; South Carolina v. United States, 199 U.S. 437, 454, 50 L. Ed. 261, 267, and in Butler v. United States, 297 U.S. 1, 74, 56 S. Ct. 312, 323.

Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not in-

directly accomplish those ends by taxing and spending to purchase compliance. The Constitution and the entire plan of our government negative any such use of the power to tax and to spend as the act undertakes to authorize. It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore consitutional limitations upon its own powers and usurp those reserved to the states. If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, Clause 1 of Section 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the state.

These matters have been pointed out because it appears from careful study of applicable constitutional principles that the real constitutional issue was never presented to the Court either by briefs and argument, or by law and factual matters as appear in this record. The Supreme Court in Oklahoma v. United States Civil Service Commission has said that the Act in question is constitutional, and this Court is bound thereby; but this Court believes that in event this case is reviewed by a higher court, the matter in issue should be fully discussed for the purpose of enabling a reviewing court to have before it the full benefit of the constitutional principles involved.

However, the Oklahoma case leaves open the question of the constitutional rights of the state officer. Many of the things pointed out above can be applied factually to the Director of Conservation, Mr. Palmer, the respondent, who also appeals from the order of the Commission, and this is sepecially true as far as state law is concerned. These matters having been pointed out above, they will not be further stated.

The Constitution of the United States and of the State of Illinois protect the individual and his rights. The fifth amendment to the United States Constitution provides,

> "No person shall * * * be deprived of life, liberty or property without due process of law * * *",

and the Illinois Constitution provides under Article II, Sections 1, 2, 19 and 20, that,

> (1) "All men are by nature free and independent, and have certain inherent and inalienable rights * * * among these are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men deriving their just powers from the consent of the governed.
>
> (2) No person shall be deprived of life, liberty or property, without due process of law."
>
> (19) Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay.
>
> (20) A frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty.

and Article V. Section 10 provides:

> (10) The Governor shall nominate and by and with the advice and consent of the Senate (a majority of all the senators elected concurring by yeas and nays) appoint all state officers whose offices are established by this constitution, or which may be created by law, and whose appointment and election are not otherwise provided for, and no such officer shall be appointed or elected by the general assembly.

Under this latter provision and under and by virtue of Section 13, Chapt. 127, State Government, I.R.S. 1959, the Director received the appointment as Director of Conser-

vation of the State of Illinois for a term of two years; he was nominated by the Governor, confirmed by the Illinois State Senate, and his commission executed and delivered to him. When he accepted and assumed the duties of the office his commission was irrevocable for a period of two years. Under the above sections of the Constitution of the United States and of the State of Illinois, by this appointment, confirmation and acceptance, he had vested in him legal rights which are protected by the laws of his country and for the United States Civil Service Commission under authority of Sections 12(a) et seq. of the Hatch Act to order a finding that he was engaged in activities that warranted the State of Illinois in removing him amounts to an act not warranted by law and which is violative of his vested legal rights.

The question of these legal rights was settled early by the Supreme Court of Illinois in the case of Marberry v. Madison, 2 L. Ed. 60, 70, 1 Cranch 137, 166, where the Court said:

> When an officer is removable at the will of the executive, the circumstances which complete his appointment is of no concern; because the act is at any time revocable and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.
>
> The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases whereby the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.
>
> Mr. Marberry, then since his commission was signed by the President and sealed by the Secretary of State, was appointed; and as the law creating the office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but

vested in the officer legal rights, which are protected by the laws of his country.

To withhold the commission, therefore, is an act deemed by the Court not warranted by law, but violative of a vested legal right.

If this be the law and the Chief executive of the United States could not recall the issuance of the commission, then most certainly the legislative department, vesting such authority in the Civil Service Commission, could not order the discharge of a state officer, or even make a finding that his activity in a political party position permitted by the law of Illinois, warranted his discharge or recall for a period of eighteen months and to carry the matter to its logical conclusion the Congress of the United States has no authority to enact by law a provision for withholding from the State of Illinois a sum of money equivalent to $24,000, to accomplish this purpose.

The only right to recall the State officer is for the reasons provided in Article V, Section 12 of the Illinois Constitution. These reasons do not exist in this record, and even if they did, the sole person who is to act in the matter is the Governor. *Wilcox* v. *People, ex rel.*, 90 Ill. 186, 204. This case so holds. The courts of Illinois, under the State Constitution, cannot interfere. The State Constitution having been ratified and approved under the Illinois Admission Act by the Congress, the act of approval prohibits the Congress from any further action either directly or indirectly when the provision of the Illinois Constitution is not in conflict with any provision of the Federal Constitution. The courts of the United States will follow the courts of Illinois in construing the provisions of the Illinois Constitution and laws. *South Carolina* v. *United States*, 199 U.S. 437, 454; 50 L. Ed. 261, 267; *Williams* v. *Oklahoma*, 358 U.S. 576, 583; *Morey* v. *Doud*, 354 U.S. 457, 470.

As pointed out in *Marberry* v. *Madison*, *supra*, the President, and in Illinois, the Governor, have certain political powers in the exercise of which they can use their own discretion, and are accountable only to their country and state in their political character and to their own consciences.

Speaking of the rights of individuals, the Supreme Court, in *Cummings* v. *The State of Missouri*, 71 U.S. 277, at 320, says:

"• • • We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is not punishment at all.' The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the cause of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. By statute 9 and 10 William III, Chap. 32, if any person educated in or having made a profession of the Christian religion, did, 'by writing, printing, teaching, or advised speaking,' deny the truth of the religion, or the divine authority of the Scriptures, he was for the first offence rendered incapable to hold any office or place of trust • • •

'Some punishments,' says Blackstone, 'consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like.'

> In France, deprivation or suspension of civil rights, or of some of them, and among these of the right of voting, of eligibility to office, . . . are punishments prescribed by her code.
>
> The theory upon which our political institutions rest is that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law . . ."

It follows that the respondent, Glen D. Palmer, is protected in these rights for all purposes as disclosed in this record under the Constitutions of the United States and of the State of Illinois, and to place him under recall or to withhold him from office under penalty to the State of having the Commission order the withholding of funds mutually and cooperatively provided for under the respective acts, both Federal and State, above mentioned, simply because he holds a political party position, or is a member of a political committee, as permitted by Illinois law, is not within the law and would violate his legal vested rights, all of which are guaranteed by both the Federal and State Constitutions as herein above mentioned.

None of the salary of Mr. Palmer, as a State officer, comes from Federal funds. Article IV, Section 16 of the Illinois State Constitution provides,

> The general assembly shall make no appropriation out of the Treasury in any private law. Bills making appropriations for the pay of members and officers of the general assembly, and *for the salaries of the officers of the government*, shall contain no provision on any other subject.

His official pay was provided for the three terms of office of two years each by three appropriation bills passed by the Illinois General Assembly. These bills are "Senate Bills", Nos. 582, for the biennium beginning July 1, 1953, p. 592,

595; Senate Bill No. 839 for the biennium beginning July 1, 1955, pp. 1277, 1280; and Senate Bill No. 715 for the biennium beginning July 1, 1957, pp. 999, 1003, all found in the Session Laws of Illinois for 1953, 1955 and 1957. These are all provided in Senate Bills entitled, "An Act making appropriations for the pay of officers and members of the General Assembly and certain officers of the State Government." The Act for each biennium is entitled the same. This is in accordance with Article IV, Sec. 16 above quoted. All other funds for the Department of Conservation, including those for cooperative purposes with the Federal Government, are appropriated under House Bill No. 717 for the biennium beginning July 1, 1953, Session Laws p. 313; Senate Bill No. 410 for the biennium beginning July 1, 1955. Session Law p. 323; Senate Bill No. 653 for the biennium beginning July 1, 1957, Session Laws, p. 892. The appropriations are made for state officers from the general revenue fund of Illinois, and from the Fish and Game Fund and General Revenue Fund for running the Department of Conservation as provided in the respective appropriation bills. It thus appears that no federal funds are used to pay the Director of Conservation. It appears in this record that Illinois funds have been used to pay for the various projects in the first instance, and that although state funds have been so used in a cooperative project, a part thereof and a very small percentage of total funds appropriated to the Department of Conservation may be repaid by Federal Agencies, if and when approved by the federal agencies. Forestry is divorced from all other activities of the Department, and it is under the supervision of the State Forester who even must be approved by the Federal Agency before the State of Illinois can employ him for the position. It further appears from this record that during the six year period in question, that the General Assembly of Illinois appropriated and spent the total sum of $35,975,405.21; that the Federal Agencies have approved projects for which Illinois has been reimbursed in the sum of $2,263,661.20, or a total percentage reimbursement of 6.30. This record further shows the numerous and burdensome duties of the

Director under State law; that practically all that the Director had to do with projects connected with Federal cooperative plans was to sign his name to documents to be sent to Federal Agencies, sign requests for reimbursement, and then transmit them to the State Auditor of Illinois for deposit in the Illinois State Treasury. The record here shows that the Director spent less than one per cent of his time in connection with projects involving federal aid to fish, game and wildlife, and no time in connection with forestry. It is a simple problem or arithmetic to thus conclude that less than 1/100 of his time, when divided into 6.3% of the refunded portion, and that his time thus spent would amount to less than .063% in relation to total activities financed in part with federal funds.

The United States Civil Service Commission has a rule that is known as the "Secondary Rule of Jurisdictional Limitation", known as the rule of the maxim "de minimis non curat lex". The examiner who heard this case recommended that this rule be followed, the Commission ruling otherwise. The Commission, in the *Joseph L. Todd* case, Docket #29, said, "the legal doctrine upon which the second rule rests is well recognized, but we shall cite several authorities." I quote the Commission as follows:

> "• • • The legal doctrine upon which the second rule rests is well recognized, but we shall cite several authorities.
>
> There is a long discussion and grouping of authorities in Broom's Legal Maxims (1939 Ed., page 88, et seq.) from which we quote a brief excerpt:
>
> When trifling irregularities or even infractions of the law are brought under notice of the court, the maxim *deminimis non curat lex* is of frequent application. • • • The law permits the qualification implied in the ancient maxim. • • • If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing in the public interest, it might properly be overlooked.
>
> See also *Love* v. *Spur School District, et al.*, 143 SW (2) 793; *Elfer* v. *Hyberna National Bank, et al.* (1937),

174 So. 387; *Hopkins* v. *Kitts*, 94 Pac. 1013; *Rose* v. *State* (Cal. 1940), 105 Pac. (2nd) 302.

In *Bristol-Myers Co.* v. *Lit Brothers* (1939), 6 Atl. (2) 843, the plaintiff sought an injunction against an alleged violation of a Pennsylvania statute which forbade 'selling any commodity for less than the price stipulated by contract with the manufacturer.' It was claimed that the defendant had violated such a contract with the plaintiff in respect to 'Ipana Tooth Paste', in that it gave 'trading stamps' with purchases of merchandise, redeemable in merchandise when stamps had been accumulated representing purchases of $99.00. The minority of the appellate court agreed with the plaintiff that 'a sale of goods accompanied by trading stamps is a sale at a reduced price.' However, the court held in accordance with the following excerpt (page 848):

There is also a time honored maxim of the law which applies in this case, to-wit: 'de minimis non curat lex'. As Broom says in his Legal Maxims: 'Courts of Justice generally do not take trifling and immaterial matter into account'. In 'The Reward', 2 Dods. Admr. R. 269, Sir W. Scott observed, 'The court is not bound to a strictness at once harsh and pedantic in the application of statutes.' If * * * a customer spent $99.00 in Lit Brothers Store for the purchase of 396 tubes of Ipana Tooth Paste (a supply adequate for a long life-time) he would be obtaining in the form of merchandise a discount of 1.76%.

Thus, apparently holding that a discount of 1.76% was 'de minimis', the court refused an injunction.

* * * * * *

We now, to show a similar recognition of the maxim by the Supreme Court, quote an excerpt from an opinion delivered by Mr. Justice Stone (1939) in *National Labor Relations Board* v. *Feinblatt, et al.*, 306 U.S. 601:

Examining the Act in the light of its purpose and in the circumstances in which it must be applied, we can

perceive no basis for inferring any intention of Congress to make the operation of the Act depend upon any particular volume of commerce affected more than that to which the courts would apply the maxim *de minimis*."

If the range of percentages under the de minimis rule runs as high as 1.76% to a low of 1/10 of 1%, then the percentage of time spent as to total federally aided projects of less than .063% is within the range and the Commission should have followed this rule in the instant case.

The next question raised by the petitioners is that the Director of Conservation is not employed in connection with an activity financed in whole or in part by "loans or grants" from the United States or any Federal Agency. The record here shows that the State of Illinois, on fish and game matters, spends its money to complete projects that are eligible for Federal reimbursement upon approval of a project plan. Thus the proportionate part of the money is repaid to the State in accordance with the terms of the cooperative contracts entered into under the sanction of State and Federal law on the subject. Since no money is to be repaid to the United States, it cannot be said that a "loan" is involved in the commonly accepted definition of a loan. The term "loan" is not defined in the "Hatch Act". All words in a legislative enactment, absent a definition in the "Act" itself, must be ascribed their accepted, understood meaning. Black's Law Dictionary, 4th Edition, p. 1085, defines a loan as a "lending or borrowing of money or other personal property by a person who promises to return it; that which one lends or borrows". Accordingly since under this definition, and as the term "loan" is generally understood, it cannot be said that a loan is involved as to any fish and game contract matter. The same is true as to projects under the Clarke-McNary Act, the Cooperative Foust Management Act of 1950, and the Soil Bank Program. State money is spent, and, after approval by the appropriate Federal Agency, reimbursement may be received. No federal money is repaid, so no "loan" is involved.

The next question as to whether a "grant" is involved, since the term "grant" is not defined in the "Hatch Act",

causes one to look to the meaning of the term. In Webster's New International Dictionary, the term "grant" is defined as "to bestow or confer, with or without compensation", and "a gift or bestowal by one having control or authority over it, as of land, money, etc." p. 1089. While it is true that the State spends its money, anticipating a return of a portion of it, I believe that the term "grant" is broad enough to include the Federal moneys returned or to be returned to the State, under the record in this case.

The facts and law as herein set out are adopted as findings of fact and conclusions of law by the Court, and for the reasons herein set out the Court finds and determines that the order of the United States Civil Service Commission is not in accordance with law.

Accordingly this case is remanded to the Commission with directions to set aside the Order, and to dismiss the Letter of Charges.

Entered this 12th day of January, A.D. 1961.

/s/ Omer Poos,
United States District Judge.

Attorneys for Pltf.:

Mr. William H. South.
Asst. Atty. General,
Springfield, Illinois

Mr. Granville Beardsley.
Atty. General,
Springfield, Illinois

Attorney for Dft.:

Harlington Wood, Jr.
U.S. Attorney,
Springfield, Illinois

A true copy.
Attest.

William J. Littell, *Clerk.*

APPENDIX III.

Judgment of the Court of Appeals:

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, and that this cause be, and it is hereby, REMANDED to the said District Court with instructions to affirm the determination of the United States Civil Service Commission, in accordance with the opinion of this Court filed this day.

APPENDIX IV.

118K. Employees of State or local agencies financed by loans or grants from United States—Influencing elections; officers or employees defined.

(a) No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal Agency shall (1) use his official authority or influence for the purpose of interfering with an election or nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any such officer or employee to pay, lend or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political campaigns. All such persons shall retain the right to vote as they may choose, and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or Lieutenant Governor of any state, or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil service system; (3) officers holding elective offices.

Investigations by Civil Service Commission; removal of employees; withholding grants from States.

(b) If any Federal agency charged with the duty of making any loan or grant of funds of the United States for use in any activity by any officer or employee to whom the provisions of subsection (a) are applicable has reason to believe that any such officer or employee has violated the provisions of such subsection, it shall make a report with respect thereto to the United States Civil Service Commis-

sion (hereinafter referred to as the "Commission"). Upon the receipt of any such report, or upon the receipt of any other information which seems to the Commission to warrant an investigation, the Commission shall fix a time and place for the hearing, and shall by registered mail or by certified mail send to the officer or employee charged with the violation and to the State or local agency employing such officer or employee a notice setting forth a summary of the alleged violation and the time and place of such hearing. At such hearing (which shall be not earlier than ten days after the mailing of such notice) either the officer or employee or the State or local agency, or both, may appear with counsel and be heard. After such subsection has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it was committed from his office or employment, and shall by registered mail or by certified mail notify such officer or employee and the appropriate State or local agency of such determination. If in any case the Commission finds that such officer or employee has not been removed from his office or employment within thirty days after notice of a determination by the Commission that such violation warrants his removal, or that he has been so removed and has subsequently (within a period of eighteen months) been appointed to any office or employment in any State or local agency in such State, the Commission shall make and certify to the appropriate Federal agency an order requiring it to withhold from its loans or grants to the State or local agency to which such notification was given an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation; except that in any case of such a subsequent appointment to a position in another State or local agency which receives loans or grants from any Federal agency, such order shall require the withholding of such amount from such other State or local agency; *Provided*, That in no event shall the Commission require any amount to be withheld from any loan or grant pledged by a State or local agency as security for its bonds or notes if the withholding of such amount would jeopardize the payment of the principal or interest on such bonds or notes.

Notice of any such order shall be sent by registered mail or certified mail to the State or local agency from which such amount is ordered to be withheld. The Federal agency to which such order is certified shall, after such order becomes final, withhold such amount in accordance with the terms of such order. Except as provided in subsection (c), any determination or order of the Commission shall become final upon the expiration of thirty days after the mailing of notice of such determination or order. As amended June 11, 1960, Pub. L. 86—507, § 1 (1), 74 Stat. 200.

MICRO CARD
TRADE MARK ®

22

CD 4632

MATTHEW BENDER & COMPANY

T1-9-

microcard

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
The statutory plan	3
The pertinent facts and the Commission's determinations	4
The decisions of the courts below	6
Argument	7
Conclusion	11
Appendix	12

CITATIONS

Cases:

Baker v. *Carr*, No. 6, Oct. Term 1961, decided March 26, 1962	10
Oklahoma v. *Civil Service Commission*, 330 U.S. 127	6, 7, 8, 9, 10
State of Oklahoma v. *United States Civil Service Commission*, 153 F. 2d 280	8
United Public Workers v. *Mitchell*, 330 U.S. 75	6

Constitution and Statutes:

Constitution of the United States, Article I, § 4	10
Federal Highway Act, 42 Stat. 212, as amended, 23 U.S.C. (1946 Ed.) 1-117	7
Hatch Political Activities Act, as added by Section 1 of the Act of July 19, 1940, 54 Stat. 767, 5 U.S.C. 118k:	
Section 12	2, 5, 6, 12
Section 12(a)	2, 12
Section 12(b)	3, 13-15
Section 12(c)	4, 15, 16

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 714

STATE OF ILLINOIS and GLEN D. PALMER,
PETITIONERS

v

UNITED STATES CIVIL SERVICE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court's opinion (Pet. App. 36-112) is reported at 191 F. Supp. 495. The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. 27-35) is reported at 297 F. 2d 450.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1962. The petition for a writ of

certiorari was filed on February 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the civil remedies of the Hatch Act—which give to the affected State the option of (1) removing the State officer whose political activities violate the Act, or (2) losing an amount of federal funds equal to twice that officer's annual salary—constitute an unconstitutional interference with State prerogatives and, in particular, deny the State a republican form of government.

2. Whether the Hatch Act applies to an officer who controls the policy, personnel, and administration of the Illinois Conservation Department, the activities of at least eight of the nine Divisions of which are financed in part by federal funds.

STATUTE INVOLVED

The pertinent parts of Section 12 of the Hatch Political Activities Act, as added by Section 4 of the Act of July 19, 1940, 54 Stat. 767, 5 U.S.C. 118k, are set forth in the Appendix, *infra*, pp. 12-16.

STATEMENT

Petitioners are the State of Illinois and Mr. Palmer, who was the Director of the Illinois Department of Conservation. They seek review of a decision of the Court of Appeals, reversing the District Court and reinstating the United States Civil Service

Commission's order that Palmer violated Section 12 of the Hatch Act and that his violation warranted his removal from his State office.

The statutory plan. Section 12(a) of the Hatch Act (App., *infra*, p. 12) directs that "no officer or employee" of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal Agency" shall, *inter alia*, "take any active part in political management or in political campaigns." The Act, however, expressly reserves to such persons the right "to vote as they may choose and to express their opinions on all political subjects and candidates."

Section 12(b) (App., *infra*, pp. 13-15) provides for investigations by the Civil Service Commission upon complaint, notice to the allegedly offending person and the State by which he is employed, and a hearing. The Commission is then to "determine whether any violation of [subsection (a)] has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it

---

The concluding sentence of Section 12(a) states that "the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices." There is no dispute that these exceptions are inapplicable to this case. See Pet. 5, n. 1, 11.

was committed from his office or employment," with an eighteen-month period of ineligibility for reappointment. The Commission notifies both the individual and the State of its determination. If the individual is not removed within thirty days of such notification, or has been reappointed to any position in a State or local agency in that State within eighteen months of removal, the Commission is to "certify to the appropriate Federal agency an order requiring it to withhold from its loans or grants to the State or local agency * * * an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation." Notice of this order is sent to the State or local agency from which such amount is ordered to be withheld.

Section 12(c) (App., *infra*, pp. 15-16) provides that "[a]ny party aggrieved by any determination or order" may seek district court review "of such determination or order." The court reviews the Commission's determination or order on the administrative record. The Commission's findings of fact are "conclusive" if "supported by substantial evidence" and its "determination or order" is to be affirmed if it "is in accordance with law."

The pertinent facts and the Commission's determinations. The facts are not in dispute. Palmer was employed from January 28, 1953, as Director of the Department of Conservation of the State of Illinois, an office filled by appointment of the Governor of Illinois (R. 14, 16, 20, 22). In this position, Palmer had responsibility for administering,

either directly or through subordinates whom he supervised, various programs which were partially financed by federal monetary grants in substantial amounts (R. 46, 48, 62, 111). While he held this position, Palmer took an active part in political management and political campaigns. These activities included his service as Precinct Chairman and as Chairman of the Kendall County Republican Committee throughout his employment with the Department of Conservation. They also included his filing of primary petitions for political office, his solicitation of signatures for such petitions, and his candidacy for an election to political office (R. 14, 20, 23).

Upon the basis of these facts, the Civil Service Commission issued a letter of charges against both petitioners with respect to Palmer's violation of Section 12 of the Hatch Act (R. 13-15). Petitioners defended on the grounds, *inter alia*, that Section 12 of the Hatch Act "is unconstitutional as an invasion of the rights of Sovereign States by forcing the election of such Director, rather than his appointment by the Governor of such State" and that Palmer's principal employment was not connected with federally-supported activities (R. 22).[2]

After a hearing, the Commission, in two orders, found that Section 12 applied to Palmer in that his principal employment was in connection with State activities financed in part by grants from the federal

---

[2] Petitioners also raised other defenses before the Commission and the court below, but these points have been abandoned in this Court.

government, that Palmer had violated Section 12 by taking active part in political management and campaigns, and that the violation was of a character warranting his removal from his position as Director of Conservation (R. 95-104, 105-113).

The decisions of the courts below. Petitioners asked the District Court, under Section 12(c) of the Hatch Act (App., *infra*, pp. 15-16), for review of the Civil Service Commission's determinations (R. 1-6). That court reversed the Commission's order (Pet. App. 36-112). In a long opinion, the court recognized that it was bound by this Court's decision in *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, sustaining the constitutionality of the Hatch Act (Pet. App. 102). The court stated, however, that the *Oklahoma* case "leaves open the question of the constitutional rights of the state officer" (Pet. App. 102), and it apparently concluded that the remedies in the Hatch Act violated Palmer's constitutional and "vested legal rights" in his office (Pet. App. 104). The court also held that the part played by federal grants in Palmer's area of responsibility was *de minimis* and therefore should be overlooked (Pet. App. 107-111).

The court of appeals reversed. It noted that the grounds urged by petitioners for the unconstitutionality of Section 12 were similar to those urged in the *Oklahoma* case, and expressly rejected by this Court. The court of appeals also held, on the authority of *United Public Workers* v. *Mitchell*, 330 U.S. 75, that the private interests of Palmer in his employment were not invalidly affected by the Hatch

Act. Finally, the court held that the rule of *de minimis* was inapplicable to this case, agreeing with the Commission that Palmer (Pet. App. 34):

> had administrative supervision of all nine Divisions of the Department of Conservation. At least six of such Divisions conducted activities to which federal contributions had been made. Palmer was responsible for major policy decisions which had to be made at state level. He initially approved the project plan and report for each federal aid project. By state law, he was given specific responsibility for the state development of Federal-Grant-in-Aid projects. His duties in connection with federally financed activities took up at least fifty percent of his time.

ARGUMENT

1. The court below correctly ruled that this case is controlled by *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127. The constitutional issues raised by petitioners were considered and decided in that case; there is no need for reexamination or further review.

In the *Oklahoma* case, the state official, Paris, while a member of the State Highway Commission, was also, for nine months in 1943, chairman of the Oklahoma Democratic State Central Committee. As a member of the Highway Commission, which received over $2,000,000 from a federal agency under the Federal Highway Act, 42 Stat. 212, as amended, 23 U.S.C. (1946 Ed.) 1-117, his "principal employment" was held to be "in connection with an activity financed in whole or in part by loans and grants from

Federal agency." 330 U.S. at 132. His participation in politics during the nine-month period was comparatively modest, because Oklahoma held no general election that year and the State Democratic headquarters were closed part of the time. As an *ex officio* member of a political dinner committee "he advised with the Governor [of the State] concerning the dinner and called the meeting to order and introduced the toastmaster but he was not active in planning or arranging the dinner." 330 U.S. at 132. The Civil Service Commission determined that these facts constituted taking an active part in political management and in political campaigns, and warranted Paris' removal as Highway Commissioner. These determinations were upheld in the District Court, 61 F. Supp. 355 (D. Okla.), and the Court of Appeals (*State of Oklahoma* v. *United States Civil Service Commission*, 153 F. 2d 280 (C.A. 10)).

In this Court the State of Oklahoma assailed these decisions on the following grounds (330 U.S. at 133-134):

> (1) The Hatch Political Activity Act, in so far as it attempts to regulate the internal affairs of a state, is an invasion of the sovereignty of the states in violation of the United States Constitution. It further is invalid as an unlawful delegation of power.
>
> (2) If valid, the Act applies only to "active" participation in political management or political campaigns. Such "active" participation is not shown to be present in this case.
>
> (3) If valid, the Act did not warrant the United States Civil Service Commission in order-

ing the removal of a state officer or, alternatively, the application of a penalty to the State of Oklahoma.

(4) The decisions of the lower courts place an intolerable and unjustified restriction upon the right of an aggrieved person to a complete judicial review under the Hatch Political Activity Act.

This Court rejected all four attacks on the validity of the Hatch Act. The suggestions of invalidity asserted in the court below in the case now here simply repeat the first three grounds of attack presented and rejected by this Court in the *Oklahoma* case.

Specifically, the Court held that "the United States does have power to fix the terms upon which its money allotments to states shall be disbursed" and "the Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case." 330 U.S. at 143. The Court continued (*ibid.*):

> The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid.

And the Court expressly upheld the remedy provision of the Act, under which, if the State fails to remove the offending official, an amount equal to twice his annual salary will be ordered withheld from the State (330 U.S. at 143-144).

Petitioners contend (Pet. 16, 20), however, that the *Oklahoma* decision is not decisive because "Oklahoma did not invoke that provision of the Constitution" that guarantees "to every State in this Union . . . a Republican Form of Government," which is claimed to invalidate Section 12. But the fact is that Oklahoma, in arguing that the Hatch Act "in so far as it attempts to regulate the internal affairs of a state is an invasion of the sovereignty of the states in violation of the United States Constitution" (Petitioners' Br., 1946 Term, No. 84, p. 9), did rely upon, *inter alia*, "Art. 4, § 4 of the United States Constitution, which guarantees to every state in the union a republican form of government." Under Article 4, § 4, Oklahoma argued, "it is the prerogative of a state to create and maintain its offices of government" (*id.* at 13). The *Oklahoma* decision disposed of that argument as well as of the others. See also *Baker* v. *Carr*, Oct. Term 1961, No. 6, decided March 26, 1962, slip op., Part IV.

Nor is there any novelty or merit to petitioners' argument that the Hatch Act is invalid because of its effect on the "form of State governments," in that it may require certain States to forego federal grants (Pet. 17). The State of Illinois has no vested interest in a federal grant; to receive such an award it must meet conditions set by Congress. And these conditions, the Court held in *Oklahoma*, Congress has the power to exact. 330 U.S. at 143. The choice is up to Illinois.

2. Petitioners' subsidiary contention that Palmer's position was not subject to Hatch Act proscriptions,

because his "principal employment" was not "in connection with any activity which is financed in whole or in part" by federal loans or grants (Pet. 22-25), cannot be squared with the admitted facts of this case. Palmer directly supervised nine Divisions of the Department of Conservation and had complete responsibility for policy direction and administration (R. 46, 48, 62). The Civil Service Commission found that eight of these nine Divisions were financed in part with federal funds (R. 111); it based its finding partially upon the testimony of Palmer to that effect (R. 42). On this factual issue, the court of appeals agreed with the Commission (Pet. App. 34) and there is clearly no need for further review by this Court. That the activities were only financed "in part" by federal funds is immaterial, for that is all that the Hatch Act requires. See Section 12(a), App., *infra*, p. 12.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

MORTON HOLLANDER,
SHERMAN L. COHN,
Attorneys.

MARCH 1962.

APPENDIX

Section 12 of the Hatch Political Activities Act, as added by Section 4 of the Act of July 19, 1940, 54 Stat. 767, 5 U.S.C. 118k, provides in pertinent part:

> Sec. 12. (a) No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices.

(b) If any Federal agency charged with the duty of making any loan or grant of funds of the United States for use in any activity by any officer or employee to whom the provisions of subsection (a) are applicable has reason to believe that any such officer or employee has violated the provisions of such subsection, it shall make a report with respect thereto to the United States Civil Service Commission (hereinafter referred to as the "Commission"). Upon the receipt of any such report, or upon the receipt of any other information which seems to the Commission to warrant an investigation, the Commission shall fix a time and place for a hearing, and shall by registered mail send to the officer or employee charged with the violation and to the State or local agency employing such officer or employee a notice setting forth a summary of the alleged violation and the time and place of such hearing. At such hearing (which shall be not earlier than ten days after the mailing of such notice) either the officer or employee or the State or local agency, or both, may appear with counsel and be heard. After such hearing, the Commission shall determine whether any violation of such subsection has occurred and whether such violation, if any, warrants the removal of the officer or employee by whom it was committed from his office or employment, and shall by registered mail notify such officer or employee and the appropriate State or local agency of such determination. If in any case the Commission finds that such officer or employee has not been removed from his office or employment within thirty days after notice of a determination by the Commission that such violation

warrants his removal, or that he has been so removed and has subsequently (within a period of eighteen months) been appointed to any office or employment in any State or local agency in such State, the Commission shall make and certify to the appropriate Federal agency an order requiring it to withhold from its loans or grants to the State or local agency to which such notification was given an amount equal to two years' compensation at the rate such officer or employee was receiving at the time of such violation; except that in any case of such a subsequent appointment to a position in another State or local agency which receives loans or grants from any Federal agency, such order shall require the withholding of such amount from such other State or local agency: *Provided*, That in no event shall the Commission require any amount to be withheld from any loan or grant pledged by a State or local agency as security for its bonds or notes if the withholding of such amount would jeopardize the payment of the principal or interest on such bonds or notes. Notice of any such order shall be sent by registered mail to the State or local agency from which such amount is ordered to be withheld. The Federal agency to which such order is certified shall, after such order becomes final, withhold such amount in accordance with the terms of such order. Except as provided in subsection (c), of this section, any determination or order of the Commission shall become final upon the expiration of thirty days after the mailing of notice of such determination or order.

(c) Any party aggrieved by any determination or order of the Commission under subsection (b) may, within thirty days after the mailing of notice of such determination or order, institute proceedings for the review thereof by filing a written petition in the district court of the United States for the district in which such officer or employee resides; but the commencement of such proceedings shall not operate as a stay of such determination or order unless (1) it is specifically so ordered by the court, and (2) such officer or employee is suspended from his office or employment during the pendency of such proceedings. A copy of such petition shall forthwith be served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the determination or the order complained of was made. The review by the court shall be on the record entire, including all of the evidence taken on the hearing, and shall extend to questions of fact and questions of law. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceedings and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may direct such additional evidence to be taken before the Commission in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings of fact or its determination or order by reason of the additional evidence so taken and shall file with the court such modified findings, determination, or

order, and any such modified findings of fact, if supported by substantial evidence, shall be conclusive. The court shall affirm the Commission's determination or order, or its modified determination or order, if the court determines that the same is in accordance with law. If the court determines that any such determination or order, or modified determination or order, is not in accordance with law, the court shall remand the proceeding to the Commission with directions either to make such determination or order as the court shall determine to be in accordance with law or to take such further proceedings as, in the opinion of the court, the law requires. The judgment and decree of the court shall be final, subject to review by the appropriate court of appeals as in other cases, and the judgment and decree of such court of appeals shall be final, subject to review by the Supreme Court of the United States on certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., 1934 edition, title 28, secs. 346 and 347). If any provision of this subsection is held to be invalid as applied to any party with respect to any determination or order of the Commission, such determination or order shall thereupon become final and effective as to such party in the same manner as if such provision had not been enacted.